

Exxon Research & Engineering Company; Exxon Company, USA; Exxon Chemical Americas; Exxon Chemical Company and Gulf Coast Industrial Workers Union; Baytown Employees' Federation; International Association of Machinists & Aerospace Workers, Lodge 1051; International Brotherhood of Electrical Workers Local No. 527, AFL-CIO. Cases 16-CA-15875-2, 16-CA-15875-3, 16-CA-15875-4, 16-CA-15876, 16-CA-15876-2, 16-CA-15883, 16-CA-15888, 16-CA-15893, 16-CA-15898-1, and 16-CA-15898-2

May 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On April 8, 1994, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel and the Respondents filed exceptions, supporting briefs, and answering briefs. The Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified, and to adopt the recommended Order as modified and set forth in full below.

We adopt the judge's findings that the Respondents violated Section 8(a)(5) and (1) by refusing to bargain before implementing unilateral changes to their Thrift Plan (the Plan)² and violated Section 8(a)(1) by threatening adverse consequences if the Unions pursued bargaining.

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's finding that the Respondents violated Sec. 8(a)(5), we do not rely on his consideration of the administrative law judge's decision in *Trojan Yacht*, Case 4-CA-19851 (JD-1-93), currently pending on exceptions to the Board. Further, in adopting the judge's findings that the Respondents violated Sec. 8(a)(5) by refusing to bargain before implementing unilateral changes to their Thrift Plan, we disavow certain rationale in sec. II.A.2, of the judge's decision, which suggests that, to be unlawful, a unilateral change in terms and conditions of employment must have a negative effect on employees, i.e., employees must lose something. We agree with the judge, however, that only two of the five January 1993 unilateral changes were material, substantial, and significant—the reduction from four to two in the number of allowable simultaneous loans, and the increase from \$40 to \$1000 in the minimum loan amounts.

Contrary to our dissenting colleague, we adhere to our clear-and-unmistakable-waiver standard and decline to apply a less rigid "contract coverage" test when determining whether contract language may be invoked as a defense to an alleged failure to bargain over changes in mandatory subjects. The Supreme Court has upheld the clear-and-unmistakable-waiver standard when discussing the impact of a contractual provision on the waiver of a statutory right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Applying this standard, we agree with the judge that the contractual language at issue is, at best, ambiguous. The language does not expressly give the Respondents or the trustees the right to make midterm changes to the Thrift Plan unilaterally. Rather, the contract provisions merely state that they do not affect bargaining unit employees' eligibility for participation in the Thrift Plan, which shall be governed by its separate provisions. The separate plan provisions do not specifically grant the Trustees the power to make the changes in Thrift Plan loans involved here. The contracts thus do not cover the changes to Thrift Plan loans that the trustees made here. Consequently, the parties have not bargained concerning that subject.

Thus, we conclude that even under the less rigorous contract interpretation standard advanced by our dissenting colleague, the language falls short of establishing "contract coverage." A fortiori, the contract language fails to establish a clear and unmistakable waiver by the Unions of their statutory right. In fact, the contractual provisions at issue in this case expressly preserve the Unions' statutory right to bargain over changes to the Thrift Plan, by stating that they do *not* constitute a waiver of the rights which the Unions have to bargain concerning the Plan.

THE REMEDY

The General Counsel excepts to the judge's remedy for the Respondents' 8(a)(5) violations. The General Counsel asserts that the judge erred by failing to order restoration of the status quo ante and make-whole relief for unit employees. The General Counsel requested rescission of the unlawful unilateral changes and re-institution of benefits that existed under the Thrift Plan as of January 1, 1993, i.e., the rights of adversely affected employees to maintain four loans simultaneously and to borrow as little as \$40 at one time.

The judge declined to recommend this affirmative relief because he found that "*the Respondents* have no powers whatsoever to 'rescind' a change ordered by the Trustee(s), nor in any manner to compel 'reinstitution' of a 'benefit' under the Thrift Plan itself." He concluded that such relief required action by the trustees or Exxon as trustor, neither of whom were named as "Respondents" or as necessary parties.

We find merit in the General Counsel's exceptions to the judge's failure to find that the named Respondents have the power and authority to effectuate the requested relief. In cases of this type, it is the Board's customary policy to order Respondents to rescind unilateral changes and to reinstate the conditions that existed prior to the unilateral action. The purpose of the restoration order is to prevent a wrongdoer from enjoying the fruits of the unfair labor practices and gaining an undue advantage at the bargaining table. We conclude that this affirmative remedy is warranted here.

The Respondents had the undisputed authority to bargain before implementing the changes to the Thrift Plan made by the trustees. The Respondents, however, argue that the Unions relinquished their right to bargain over such changes during the term of the contract by delegating the right to make those changes to the trustees. We have rejected this argument. Thus, any changes during the term of the contract may be made only with the consent of the Unions. Accordingly, we will order the Respondents to rescind the changes they announced and unilaterally implemented for unit employees on January 1, 1993; to reinstate the terms of the Thrift Plan as they existed for unit employees on January 1, 1993; and to make whole adversely affected unit employees by retroactively granting rights under the reinstated terms during the period of remedial bargaining over the changes.³

As noted by the judge, equitable restoration of employees to the status quo ante presents complex problems with multiple ramifications. The resolution of these problems, now only speculative, is necessarily left to the compliance stage of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondents, Exxon Research & Engineering Company; Exxon Company, USA; Exxon Chemical Americas; Exxon Chemical Company, Irving, Texas, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing the Unions' demands to bargain about, or unilaterally implementing, any material, substantial, and significant changes to the wages, hours of work, or other terms and conditions of employment of employees in the units represented by the Unions.

(b) Telling employees that if the Unions persist in demanding such bargaining this would damage the bargaining relationships, or that the employees would lose

current Thrift Plan benefits, or that any bargaining on such subjects would begin from a blank sheet of paper.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Unions as the exclusive representatives of employees in the appropriate units and embody any understanding reached in a signed agreement.

(b) Rescind the changes implemented unilaterally on January 1, 1993; reinstitute the terms of the Thrift Plan as they existed on January 1, 1993; and make whole adversely affected unit employees by retroactively granting rights under the terms of the Thrift Plan as it existed on January 1, 1993, in the manner set forth in the remedy section of this decision.

(c) Post at their facilities in Houston and Baytown, Texas, copies of the attached notice marked "Appendix."⁴ Copies of the notice on forms provided by the Regional Director for Region 16, after being signed by the Respondents' authorized representative, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

MEMBER COHEN, dissenting in part.

I agree with my colleagues that the Respondents' November 17, 1992 statements violated Section 8(a)(1). I do not agree that the Respondents violated Section 8(a)(5) by refusing to bargain before implementing certain Thrift Plan changes on January 1, 1993.

The parties bargained about the Thrift Plan, and the subject is covered by the applicable collective-bargaining agreements. These agreements provide that the Thrift Plan shall be governed by its separate provisions. In such circumstances, the issue is *not* whether the statutory right to bargain has been waived. Rather, the parties *have bargained* concerning the subject matter, and they have embodied their agreement in the

³Our Order does not encompass changes to the Thrift Plan as it applies corporatewide. Rather, we merely require that, during the period of remedial bargaining, the Respondents restore the status quo ante for unit employees and make them whole for any loss of benefits they have suffered because of the Respondents' implementation of the trustees' changes without bargaining with the Union.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

contracts.¹ The only issue is one of interpreting the terms of these contracts.²

As to that issue of contract interpretation, I begin with the clear provisions of the Plan itself. Under the Plan, the trustees are given the power to make changes of the type involved here. Concededly, the collective-bargaining agreements also provide that the Unions do not waive *such rights as they have* concerning the Plan. The issue is thus whether this “non-waiver” provision of the contract takes away from the trustees their power to act. I find that the provision does not do so. The “non-waiver” provision simply preserves for the Unions such bargaining rights as they have concerning the Plan. As discussed above, however, the Unions agreed, by contract with the Respondents, to grant certain power to the trustees. Those powers embrace the instant changes. This conclusion is fortified by a bargaining history and past practice that permits the trustees to make changes regarding plan loans.

In sum, as the trustees’ changes in this case are an integral part of what the Unions bargained for and received under the contract, the Respondents had no statutory duty to bargain anew about matters covered by the agreement. Rather, the trustees, with the consent of the Respondents and the Unions, have the power to act and they have acted. Accordingly, the Respondents’ failure to bargain about that action is not a violation of Section 8(a)(5).

Because there is no violation, there is no remedy. The remedial issue discussed by my colleagues, however, sheds light on the liability issue. I agree with the judge that no affirmative remedial relief could be ordered against the named Respondents. The Respondents have no power to rescind a change ordered by the trustees, or to compel reinstitution of a benefit under the Thrift Plan. The Respondents lack the power to rectify or undo the trustees’ changes because they and the Unions gave the trustees the power to act. Thus, it could not be more clear that, pursuant to the agreement of the parties, there was nothing to bargain about. In sum, the inappropriateness of any affirmative relief

for the Respondents’ conduct reinforces my conclusion that the Respondents had no obligation to bargain about the trustees’ action.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act in our dealings with the four Unions who represent various units of our employees at the Baytown Refinery and at the chemical plant in Houston, namely: Gulf Coast Industrial Workers Union; Baytown Employees’ Federation; International Brotherhood of Electrical Workers Local No. 527, AFL-CIO; and International Association of Machinists & Aerospace Workers, Lodge 1051. Consequently, the Board has ordered us to post and abide by this notice.

WE WILL NOT refuse the Unions’ demands to bargain about any material, substantial, and significant changes to the wages, hours of work, or other terms and conditions of employment of employees in units represented by the Unions; including proposed changes to the Thrift Plan, nor will we unilaterally implement any such changes.

WE WILL NOT tell employees that if the Unions persist in demanding such bargaining this would damage the bargaining relationships, or that the employees would lose current Thrift Plan benefits, or that any bargaining on such subjects would begin from a blank sheet of paper.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them Section 7 of the Act.

WE WILL, on request by the Unions, or any of them, bargain collectively in good faith concerning the effects on the employees they represent of our implementation on January 1, 1993, of changes which reduced the number of outstanding simultaneous Thrift Plan loans employees could maintain, and which raised the minimum allowable loan amount, and embody any understanding reached in a signed agreement.

WE WILL rescind the changes implemented unilaterally on January 1, 1993; reinstitute the terms of the Thrift Plan as they existed on January 1, 1993; and make whole adversely affected unit employees by

¹ *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), citing *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992).

² My colleagues rely on the “waiver” analysis of *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). That case, however, is wholly inapposite. That case involved the issue of whether a union waived the right of employees to be free from 8(a)(3) discrimination. In resolving that issue, the Court applied a “clear and unmistakable” standard. As the D.C. Circuit has explained, however, the issue is far different in cases where the question is whether employer conduct under a contract clause violates Sec. 8(a)(5). In such cases, the issue is simply one of contract interpretation. See cases cited in fn. 1, above; see also *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992).

retroactively granting rights under the terms of the Thrift Plan as it existed on January 1, 1993.

EXXON RESEARCH & ENGINEERING
COMPANY

EXXON COMPANY, USA

EXXON CHEMICAL COMPANY

EXXON CHEMICAL AMERICAS

Tamara J. Gant, Esq., for the General Counsel.

Stephen W. Smith, Esq. (Fulbright & Jaworski L.L.P.), of Houston, Texas, for all Respondents; and *Charles A. Casey, Esq.*, of Baytown, Texas, for Respondent Exxon Company, USA.

Sharon D. Groth, Esq., of Baytown, Texas, for all the Charging Parties.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This is an unfair labor practice prosecution brought by the Board's General Counsel, acting through the Regional Director for Region 16, in the form of a consolidated complaint against the four Exxon operations: namely, Exxon Research & Engineering Company; Exxon Company, USA; Exxon Chemical Company; and Exxon Chemical Americas (the Respondents), after the Regional Director investigated 10 essentially identical charges filed by the four labor organizations, Gulf Coast Industrial Workers Union; Baytown Employees' Federation; International Association of Machinists & Aerospace Workers, Lodge 1051; and International Brotherhood of Electrical Workers Local No. 527, AFL-CIO, named in the caption (the Unions).¹ I heard the cases in trial in Houston, Texas, on June 22, 1993. Although treated in the consolidated complaint as separate "employers," the Respondents filed a common answer, and they were represented collectively at the trial by common counsel, as were the Unions. All parties filed a posttrial brief; I have studied each one.

The consolidated complaint (complaint) alleges that the Respondents commonly violated Section 8(a)(5) of the Act when (a) they refused the Unions' October 27, 1992 requests to bargain over five announced changes to a "Thrift Plan" covering, inter alia, employees represented by the Unions in the Respondents' Houston area operations and (b) implemented those changes unilaterally on January 1, 1993. The complaint further alleges that the Respondents commonly violated Section 8(a)(1) of the Act when a common spokesman for them threatened employees on November 17, 1992, that if they persisted in seeking bargaining over these changes, this would "damage" the bargaining relationship,

and that any such bargaining would "begin with a blank sheet of paper."

In their answer to the complaint, the Respondents admit that the Board's jurisdiction is properly invoked against each one of them separately,² and that they commonly implemented the Thrift Plan changes in question, but they deny all alleged wrongdoing. They aver affirmatively that the Thrift Plan changes were "protected" by the Act, and that the Unions in any case lost whatever rights they may have had to bargain about these changes by virtue of "waiver and/or estoppel."

Based on my studies of the record, the parties' briefs, and the pertinent authorities, I will conclude that the Respondents owed and violated a duty to bargain with the Unions before implementing some of the changes to the Thrift Plan called into question by the complaint, but that other changes were not subject to a duty to bargain. Based on my credibility assessments of the witnesses as they testified, I will also find that an agent of the Respondents made statements to "employees" (i.e., the Unions' representatives, who were also workers employed within the Respondents' operations) substantially as alleged in the complaint, and that these statements independently violated Section 8(a)(1). As to remedy, I will conclude that the Respondents must be ordered to cease and desist from such violations, and affirmatively to bargain with the Unions over the effects on unit employees of their implementation of two of the five Thrift Plan changes in question. But insofar as the General Counsel seeks any "rescission" or any other restoration of the status quo ante, I conclude that such remedies are not practical nor in law available, because the complaint has failed to name as respondents or otherwise implead the Thrift Trust and/or Exxon Corporation, at least one of which entities would be a necessary party for purposes of effecting any such remedies. My principal findings are set forth below in summary, followed by my analysis, conclusions, and recommended Order. All of these are informed by my more detailed findings on various points of fact, which are attached as appendix 2.

²Tracking the language used in the jurisdictional paragraphs in the consolidated complaint, which the Respondents have admitted, I find as follows: (a) Exxon Corporation (not named as a Respondent) is a New Jersey corporation with its principal offices in Irving, Texas; (b) Respondents Exxon Company, USA, Exxon Chemical Company, and Exxon Chemical Americas are "divisions" of Exxon Corporation[*]; (c) Respondent Exxon Research & Engineering Company is a Delaware corporation owned by Exxon Corporation and operated as an Exxon Corporation "subsidiary"; (d) in the representative 12-month period before the complaint issued, each Respondent sold and shipped more than \$50,000 worth of products directly to points outside Texas; and therefore, (e) each of the Respondents at all material times has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and each Respondent meets the Board's "discretionary" standards for the assertion of jurisdiction.

[*] Actually, it appears elsewhere in the record that Exxon Chemical Americas is itself a subordinate division of Exxon Chemical Company. Thus, the letterhead on a December 1, 1992 letter from Exxon Chemical Americas (within Jt. Exh. 1.C), identifies it as "[a] division of Exxon Chemical Company, a division of Exxon Corporation."

¹The Unions' original charges were filed on various dates in December 1992, each naming at least one of the Respondents. The Unions filed identical amendments to their charges on January 25, 1993. The Regional Director issued the consolidated complaint on January 28, 1993, together with a notice of hearing. The formal caption emerging from the Regional Director's consolidating of 10 separately docketed charges covers two pages. The caption used in this decision is an abbreviated one. (The caption is not published in this decision.)

I. PRINCIPAL FINDINGS

Exxon Corporation (Exxon) directs the operations and labor relations of its various divisions and affiliated or subsidiary companies throughout the United States, including the Respondents' four operations in the Houston, Texas area, three of which are in a complex called the "Baytown Refinery," and one of which—the "Chem Plant," operated by Respondent Exxon Chemical Company—is located within the city of Houston. Each of the Unions represents one or more recognized bargaining units of employees in these Houston area operations, comprising a total constituency of about 1900 workers.

For decades, Exxon or one of its earlier incarnations, acting through the device of a trust arrangement (Thrift Trust), has maintained an employee savings, investment, and loan plan, called the Thrift Plan, for virtually all the roughly 35,000 "U.S. dollar-paid employees"—unionized and unrepresented alike—working within the "Exxon family" of companies. (I borrow the quoted expressions from the testimony of James Rouse, who is nominally employed by Respondent Exxon Company, USA (EUSA), but who functions as the top labor relations official (manager of human resources) for all companies within the Exxon family, and who also wears another hat as the administrator of all Exxon's benefit plans, including the Thrift Plan.) Employees exercise investment options under the Thrift Plan by contributions deducted from their paychecks; these are at least matched by Exxon contributions and, if the employee opts to buy Exxon stock, Exxon pays a higher percentage of the total contribution than if other investment arrangements are chosen. The Thrift Trust controls nearly \$6 billion in assets, nearly half of which are held in the form of stock, including enough Exxon stock to make the Thrift Trust, in Rouse's words, "if not the major holder, certainly one of the major holders of Exxon stock in the world today."

The Thrift Trust confers a variety of specific powers on the "[t]rustee" (actually, there are five trustees—all of them Exxon officials, appointed by Exxon as trustor, and subject to replacement at Exxon's will), and it also provides that,

The Trustee shall have any additional powers that it may deemed [sic] appropriate for full and complete management of the *Thrift Fund* and to carry out the purposes of this Trust.³

Over the decades of the Thrift Plan's existence, the Thrift Trust trustees have become accustomed to making what the Respondents now call "administrative changes" to the particulars of the Thrift Plan. By far the most common of these, historically, were periodic, market-driven changes in the interest rate on loans available to Thrift Plan participants.⁴ Vir-

tually all of the remaining changes can be characterized as having "added" certain features or options to the Thrift Plan, or as having "enhanced" existing features or options available under the Thrift Plan. Moreover, many of these were announced as having been in some way or another mandated by ERISA requirements or by changes in Federal tax laws and interpretations. Historically, the Unions had been preadvised of these changes, and had acquiesced in them.

Sometime in 1992, the Thrift Plan trustees authorized certain further changes, some of them due to be effective on September 1, 1992 (September changes), others not until January 1, 1993 (January changes). We are not concerned with the September changes, except as background.⁵ Three of the January changes had no obvious "adverse" impact on the employee-participants; indeed, they could be treated for some purposes as "additions," or "enhancements."⁶ But the other two had different character: One change substantially reduced (from 4 to 2) the number of loans a participant could maintain simultaneously, and another substantially increased (from \$40 to \$1000) the minimum allowable loan amount.

All intended changes were publicized internally to various officials in the human resources departments of the various Exxon companies, including to David Clements, an EUSA human resources official, subordinate to Rouse, who generally directs labor relations for all of the Respondents' Houston area operations. Thus preadvised, Clements announced the intended changes to the Unions' representatives in a meeting on August 12, 1992.

The Unions did not request bargaining about any of the changes until October 27, after the September changes had already been implemented. In response to the Unions' October 27 requests, the parties held an additional meeting on November 17, during which Clements admittedly tried to persuade the Unions to drop their requests to bargain about the changes, and told them, among other things, that if the Unions persisted, their demands would be denied as "un-timely," and this would "likely lead [to] a confrontation . . . and that in the interest of good labor relations, I didn't feel like this was a good course for us to take." Three union agents at the meeting credibly and harmoniously testified that Clements also said that any bargaining over Thrift Plan benefits would "begin with a blank sheet [or piece] of paper."⁷ Clements, a garrulous witness, and a hard one to pin down, eventually denied having made any such "blank sheet" statement. He is contradicted on this point not only by the

⁵ Apparently because of the sequence of events described below (especially, the Unions' failures to demand bargaining until October 27, the complaint attacks as an 8(a)(5) violation only the Respondents' refusal to bargain about and implementing of the January changes, and counsel for the General Counsel has affirmatively disclaimed any attack relating to the September changes.

⁶ I think these labels probably apply to the following January changes: (1) DDA Diversification Distributions (available under and subject to laws governing Employee Stock Ownership Plans (ESOPs) to employees over 55 with at least 10 years of Thrift Plan participation) became available in the form of either cash or stock; (2) Loan repayment schedules were extended from 48 months to a maximum of 60 months; (3) Daily Valuation of Equity Units began.

⁷ Each of the union agents at the November 17 meeting was also an employee in the bargaining unit for which he or she spoke. This is why the complaint alleges that certain of Clements' statements in the meeting were "threats" made to "employees."

³ Emphasis is in the original text.

⁴ Sec. 9 of the Thrift Trust Declaration, dealing with "Loans to Participants," states as follows (emphasis in the original; the bold italics are mine):

If an *active participant*, during the preceding six months, has not borrowed any amount under this part, then, ***to the extent and on the terms permitted by the Trustee, such participant*** may at any time borrow from the Trustee any amount of cash the *participant* specifies, but not in excess of one-half of the *accrued collateral value of the participant's Thrift Fund Account* on the date the loan is granted.

union agents, but by the admissions of one of his human resources colleagues at the meeting, Payne. Crediting the other witnesses, I find that Clements, indeed, made reference to a "blank sheet." And for purposes of understanding the tone and the more precise content of Clements' remarks in the meeting, I rely primarily on the details narrated by the three union agent-witnesses, as set forth in appendix 2. In summary, I find that Clements' admitted efforts to get the Unions to withdraw their bargaining demands included explicit warnings that such demands would damage the bargaining relationship between the parties, and that if the Respondents were forced to bargain, they would insist that bargaining begin from a "blank sheet."

Clements' attempts to dissuade the Unions from their course was unsuccessful in any event; the Unions soon reiterated their bargaining demands, and on December 1, the Respondents formally denied these demands as "untimely." Thereafter, the Respondents implemented the January changes on schedule.

The Respondents, although generally conceding that benefits under the Thrift Plan are mandatory subjects of bargaining with the Unions, claim that a phrase within a certain clause found commonly in their various labor agreements with the Unions effectively limits the Unions' rights to bargain about "benefits," including Thrift Plan benefits, to times when the agreements are "open" for renegotiation. Denying this, the General Counsel and the Unions interpret an adjacent sentence in the same clause as confirming—not waiving—the Unions' rights to bargain (in midcontract, if need be) before any changes impacting on their constituencies may be made to the Thrift Plan. The contract clause in question is found in the "Benefits" sections of the various contracts; it usually appears as item "C" within article XVII. In all cases but one, the article XXVII, C language reads this way (emphasis added):

This Agreement shall not affect the eligibility of employees for participation in any company benefit plan (annuity plan, *thrift plan*, disability plans, contributory group life insurance plan, and noncontributory group life insurance plan), dependency pay for military leave and military-leave pay, or any other Company benefit plan now in effect, *all of which plans and programs shall be governed by their separate provisions. This provision, however, is not a waiver of such right as the Union has to bargain concerning these plans.*⁸

⁸The exceptional contract is the one between Gulf Coast Industrial Workers and Respondent Exxon Chemical Company, where the "non-waiver" sentence is composed only slightly differently. But that agreement is even more exceptional in that it does not contain the penultimate, "governed by their separate provisions" phrase emphasized above. Thus, that contract states materially, at art. XVII, C, nothing in this Agreement shall apply to or affect the Exxon Benefit Plan or any other of the Company's benefit plans or programs. This provision, however, is not a waiver of such rights as the Union has to bargain concerning such plans or programs.

Because I am ultimately unpersuaded that even the more typical language found in the other agreements would tend to establish union waiver of the right to bargain over the changes at issue herein, I regard the exceptional language just quoted as unimportant to the case.

This language, or minor variations on it, has been in the labor agreements between some of the Respondents and some of the Unions since sometime in the 1950s (the record is no more specific), but apparently it was not until 1964 that the language found its way into a contract (1964 contract) between Gulf Coast Industrial Workers Union (GCIWU) and at least one of the Respondents. (The 1964 contract was not itself introduced into evidence; consequently, we don't know which Respondent or Respondents was the "Management" entity involved; similarly, we don't know which unit or units of employees was/were covered by the 1964 contract.) Seeking to shed light on the meaning of the above-emphasized wording in *all* the current agreements between all the Respondents and all the Unions, the Respondents have introduced company minutes of *some* of the bargaining sessions with GCIWU leading to the 1964 contract. Perhaps most directly pertinent are the company minutes of the January 22, 1964 meeting, which say this (emphasis added):

The Union asked for an explanation in the *last sentence* in item B. Management stated that *the courts have decided that benefits are bargainable and that the purpose of the sentence is to make this clear*. However, *the purpose of the sentence about the Benefits Plans being governed by their separate provisions is to convey the thought that the plans are not subject to bargaining during the term of the contract. The effect of the last two sentences is therefore to provide that any bargaining between the parties on the plans should be done when the contract is open*. The Union asked whether it could bargain *on any changes made in the plans during the term of a contract*. Management answered in the *negative* and explained that the Company has 45 union contracts and it would be unwieldy for the Company to have to bargain with each of these unions when changes have to be made in the plans. It emphasized that it would *discuss* changes with the Union *before* they are made, as it had in the past, but that the Union would *not have the right to take the Company to arbitration if the parties fail to reach agreement concerning the changes*. The Union asked *whether with an open-end contract it could open the contract for amendment in the event the Company decided to change one of the plans*, such as was done with the Employee Discount Plan in 1961. Management answered that the Union *could open its contract, but the Company's position on bargaining concerning the plans was that if the Union insisted upon bargaining, as distinguished from discussing a plan, it would discontinue all the plans with respect to that group and bargain for new plans*. Management voiced the opinion that *the group would not fare as well because there are substantially more benefits available for the entire [Exxon] personnel than for any segment of it*. Management stressed that employee reaction to any change in the plans is communicated to Headquarters and has its effect upon future course of action.

II. ANALYSES, SUPPLEMENTAL FINDINGS, CONCLUSIONS OF LAW

A. The 8(a)(5) Unilateral Change Issues

1. Basic principles

The Act treats as “mandatory bargaining subjects” any feature of the employer-employee relationship which affects “wages, hours of work, or other terms and conditions of employment.” *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The Respondents acknowledge—in principle, at least—that benefits available under the Thrift Plan are mandatory bargaining subjects.⁹ We are instructed in *NLRB v. Katz*, 369 U.S. 736 (1961), that, because they are mandatory bargaining subjects, an employer may not change union-represented employees’ existing terms and conditions of employment on a unilateral basis, but must “maintain the status quo” pending notification to, and, upon request, bargaining with, the union representative about any such proposed changes; indeed the employer must refrain from implementing any such changes unless or until the union has either waived the right to bargain or the employer and union have bargained in good faith to agreement or impasse about such changes.¹⁰

Katz principles continue to dominate this legal arena. In *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), the Board spoke of, “[t]he few exceptions to the general rule that an employer must bargain about changes in terms and conditions of employment regardless of how those terms came to be initially established.”¹¹ And the Board has said more recently, referring to situations I take as analogous to this one, that, “the same [*Katz*] bargaining obligation applies whether the issue involved is the employer’s unilateral *granting* of merit increases [substitute here ‘benefits’] or its unilateral *discontinuance* of them.” *Daily News of Los Angeles*, 304 NLRB 511 (1991) (emphasis added), citing *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

2. Were all the January changes subject to a presumptive duty to bargain?

Considering the foregoing, especially the Board’s holding in *Daily News of Los Angeles*, supra, I doubt that it matters to the analysis that some of the January changes might be characterized as being a “grant” of a benefit and that others could be characterized as a “discontinuance” of a benefit. It is the fact of the unilaterally undertaken change itself that implicates Section 8(a)(5)’s proscriptions. Nevertheless, as I discuss next, characterizations of a different sort will matter to the analysis.

In *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991), the Board stated,

⁹Thus, Human Resources Director Rouse was questioned by the Respondents’ attorney and answered as follows:

Q: Does the company recognize that the thrift plan is a mandatory subject of bargaining?

A: Absolutely.

¹⁰See, e.g., *Intersystems Design Corp.*, 278 NLRB 759 (1986), and cases cited.

¹¹284 NLRB at 54; emphasis added. There, the majority acknowledged only two such exceptional situations in the precedents, (a) for union-security and dues-checkoff arrangements after a contract’s expiration, and (b) for postexpiration arbitration of grievances.

When changes in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a “material, substantial, and significant change.” Only changes of this magnitude trigger a duty to bargain under the Act.

When does a change rise to the “magnitude” of a “material, substantial, and significant” one, and thus “trigger a duty to bargain?” Not surprisingly, the cases are only indirectly instructive. In *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), the Board noted, somewhat generally, that “[a] change is measured by the extent to which it departs from the existing terms and conditions affecting employees.” And in *Bath Iron Works*, supra, the Board reviewed several cases where no duty to bargain had been found because the changes in those cases “constitute[d] merely particularization of, or delineations of means for carrying out, an established rule or practice.” One such example was *Rust Craft Broadcasting*, 225 NLRB 327 (1976), where no duty to bargain was found when the employer installed a timeclock to supplant a former system whereby workers’ time on the job was manually recorded on cards. There, as noted by the *Bath Iron Works* Board, the underlying “rule itself, concerning recordation of employees’ time, ‘remained intact,’ and . . . the employer’s choice of a more dependable, efficient method for enforcing its rule was not a ‘radical change,’ and thus not ‘material, substantial, and significant.’”¹² In similar vein, the *Bath Iron Works* Board cited *Trading Port*, 224 NLRB 980 (1976), characterizing that case as one where the employer had installed “a timing device to measure more accurately employees’ productivity against previously established . . . standards,” and relatedly, had “tighten[ed] . . . the application of existing disciplinary sanctions.” Concerning *Trading Port*, the *Bath Iron Works* Board further noted that, “[t]he standards themselves and the sanctions remained the same as before; thus the employer had made no significant, substantive change in the status quo and had no obligation to bargain concerning the matter.”¹³

Recapitulating previous findings, these were the January changes:

(a) DDA Diversification Distributions (available under ESOP law to employees over 55 with at least 10 years of Thrift Plan participation) became available in the form of either cash or stock.

(b) Loan repayment schedules were extended from 48 months to a maximum of 60 months.

(c) The number of allowable loans outstanding simultaneously was reduced from four to two.

(d) The minimum allowed loan amount increased from \$40 to \$1000.

(e) Daily Valuation of Equity Units began.

Counsel for the General Counsel, mindful of the threshold requirement that, to be bargainable, the changes must be “material, substantial, and significant,” simply asserts that all these changes had “a major and substantial impact on the rights of employees under the Thrift Plan.”¹⁴ She does not

¹²302 NLRB at 901, quoting 225 NLRB at 327.

¹³Id. at 901, citing 224 NLRB at 983–984.

¹⁴G.C. Br. at p. 19, fn. 5.

further particularize or defend this conclusionary assertion, however; and when I review each of the changes in question, I find only two, items (c) and (d), which are reasonably treatable as “material, substantial, and significant.”

Thus, as to item (a), I see no material change whatsoever, because employees qualifying for a DDA distribution *retained* their historical right to receive the distribution in stock form; all that changed was the addition of a new “option”—to receive distributions in cash. Where there is no evidence that employees “lost” anything, I cannot construe the addition of an alternative option as a change rising to the magnitude of a matter over which the Respondents owed a duty to bargain. I have a similar reaction to item (b); again, all that was added was an option—in this case to wait an additional 12 months before repaying a loan.¹⁵ For similar reasons, and additional ones, I find no duty to bargain over the item (e) change. There is no evidence that this seeming refinement in equity unit accounting was in reality a device that resulted in either a lower or higher valuation than previously of a participant’s equity share in the Thrift Fund. Thus, it is hard even to see a “change” affecting employees’ financial interests here, much less a “material, substantial, and significant” one. In addition, periodic “valuation of equity units” had always been a feature of the Thrift Plan; apparently all that changed is that this valuation began to be a daily one, presumably one which more accurately reflected the precise value of a participant’s equity unit at any given moment. And as a mere refinement of accounting method, this “change” strikes me as analogous to the employer’s lawful introduction in *Trading Port*, *supra*, of “a timing device to measure more accurately employees’ productivity against previously established . . . standards.”

As to items (c) and (d), however, it is evident that employees lost something they had previously enjoyed—in one case, the right to maintain as many as four outstanding loans simultaneously, in the other, the right to take out “small loans.” Both of these changes obviously went to matters directly affecting employees’ financial interests, and they were, therefore, “material” ones. Beyond that, these changes were by any yardstick, “substantial” and “significant” ones—a halving of the number of allowable simultaneous loans in one case; a 25-fold increase in the minimum borrowable amount in the other.¹⁶

Accordingly, items (c) and (d) changes—and those alone—were of sufficient “magnitude” to “trigger” a presumptive duty to bargain, and my evaluation of the Respondents’ defenses, *infra*, applies solely to those changes.

¹⁵ The record does not indicate—and the General Counsel made no effort to prove—that loans under the Thrift Plan carry a prepayment penalty. Absent such evidence, I would presume that even under the January change, employees retained the option of paying off their loans at any time, including after 48 months, the “old” payoff deadline. Therefore, I can’t see how employees might have lost something previously available to them when loan repayment schedules were extended.

¹⁶ Moreover, although I think this feature more properly deserves to be considered as part of a “waiver” analysis, my review of the previous historical “changes” to the Thrift Plan in which the Unions had acquiesced discloses no arguable precedent for such forms of “takeaways” from employees.

3. The Respondents’ defenses

I have found that the Respondents owed a presumptive statutory duty to bargain with the Unions before implementing items (c) and (d) changes to the Thrift Plan, a presumption which it became the Respondents’ burden to overcome. It is settled that a union may waive statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707–708 (1983). Proof of union waiver, therefore, is one way to overcome the presumption. But as the Court further affirmed in *Metropolitan Edison* (*id.* at 708),

we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is “explicitly stated.” More succinctly, the waiver must be clear and unmistakable.

After first insisting on brief that a “clear and unmistakable waiver” analysis “does not apply in the circumstances of this case”—a claim I dispute with elsewhere below—the Respondents nevertheless state in a neighboring footnote that “Even assuming the waiver standard were appropriate . . . Exxon [sic] contends that the contract language, bargaining history, and unbroken past practice clearly satisfy the waiver test.”¹⁷ By invoking these factors as legitimate bases for claiming waiver, the Respondents have echoed the Board’s own approach, as expressed in *American Diamond Tool, Inc.*, 306 NLRB 570 (1992):

Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.¹⁸

I will address each of these potential waiver elements separately, before reaching ultimate conclusions.

a. Contract language

(1) The Respondents’ threshold objection to applying the “clear and unmistakable waiver” standard

The Respondents recognize the “clear and unmistakable” standard for finding waiver; indeed, their fallback defense is grounded in waiver claims applying this standard. But the Respondents’ first line of defense is that a waiver analysis is not required, not even appropriate; rather, they argue that a different, “contract-interpretation” analysis, using a supposedly different standard, comes into play, where, as here, the union contract speaks in some manner to the subject sought to be bargained. Thus, they maintain at the threshold that,

This is not a case involving waiver. . . . The question presented . . . is whether the Company [sic] acted within rights granted by the collective bargaining agreement or whether they [sic] went beyond such rights into an area where both the law and the contract required

¹⁷ R. Br. at p. 17, fn. 6.

¹⁸ *Ibid.*, quoting *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

bargaining with the Unions prior to taking that [admittedly unilateral] action.¹⁹

[A] waiver [analysis] does *not* apply . . . in the context of a duty to bargain over a subject matter on which the parties have negotiated an agreement.²⁰

[T]he “clear and unmistakable” waiver standard simply does not apply in the circumstances of this case.²¹

The Respondents are apparently resisting a waiver analysis because they assume that a “contract interpretation” standard is less stringent than the “clear and unmistakable” standard for finding union waiver. Thus, they cite Judge Posner of the Second Circuit in *Chicago Tribune*,²² who questioned the viability of the “clear and unmistakable” standard, and commented that it is “a doctrine that tilts decision in the union’s favor.”²³ Moreover, the Respondents are suggesting as a matter of law that a waiver analysis is something quite alien to, or unharmonizable with, the “contract interpretation” standard they seek to have me apply. Thus, they cite Judge Buckley of the D.C. Circuit in *Electrical Workers Local 47*, who wrote,

Where the contract fully defines the parties’ rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has waived its statutory right to bargain; rather the contract will control and the “clear and unmistakable” intent standard is irrelevant.²⁴

The Respondents have also invoked Administrative Law Judge Rose’s remarks in *Trojan Yacht*, as follows:

While waiver may be a way of viewing this matter, I am more inclined to consider this a case of contract interpretation. This is not a case where the collective bargaining agreement is silent. The parties agreed to language by which the bargaining unit employees would be covered under [sic] by the Plan. Therefore, the “clear and unmistakable” standard is irrelevant.²⁵

It is not entirely frivolous of the Respondents to rely on these quotations to assert that a supposed “contract interpretation” standard—not a “clear and unmistakable waiver” standard—governs “in the context of a duty to bargain over a subject matter on which the parties have negotiated an agreement.” But it is important to recognize that the quoted views in each case are obiter dicta, that is, they are not strictly necessary to the result in each case, as a close study of

each case will show. Neither in those decisions did the judges purport to disturb the Supreme Court’s affirmation of the “clear and unmistakable waiver” standard in *Metropolitan Edison*, supra. And it is worth recalling that the *Metropolitan Edison* Court affirmed the “clear and unmistakable” test for waiver *in the very context of* a discussion of the impact of a “contractual provision” on the waiver question. And in *Electrical Workers Local 47*, supra, the D.C. Circuit, despite its above-quoted dicta, acknowledged the primacy of the “clear and unmistakable” standard, further observing that, “to this end, the words of the collective bargaining contract are evidence of the parties’ intentions,” and further, that, “bargaining history is also considered when it is crucial to understanding the purpose behind the contractual language.”²⁶

I think the Respondents have distorted the picture by suggesting from the dicta in the three factually diverse cases they have cited that there has emerged in the law a general tendency to apply a standard of “contract interpretation” which is somehow different from, or excludes resort to, the “clear and unmistakable waiver” test when it comes to assessing the impact of contract language on a union’s statutory bargaining rights. The Respondents concede that the distinction which they seek to draw (supposed contract interpretation standard vs. waiver standard) is one not well established in the cases. Thus, in a footnote, they say that “[t]he Board has admittedly not been entirely consistent in this area.”²⁷ But even this concession is somewhat coy, for it suggests a state of the law in which the Board has not yet fully engaged with, much less decided, which of two supposedly competing standards (contract interpretation vs. waiver) is to be applied when assessing an employer’s defense to a unilateral change grounded on contract language. This suggestion is fanciful. In *American Diamond Tool, Inc.*, supra, the Board again acknowledged the primacy of the “clear and unmistakable waiver” analysis directed in *Metropolitan Edison*, but recognized that such a waiver can be established, among other ways, by an “express provision in the collective bargaining agreement.” From that case, I think it is evident that the Board does not see the “clear and unmistakable waiver” standard as “irrelevant” to the analysis when a labor agreement may in some way speak to the subject sought to be bargained; to the contrary, the *American Diamond Tool* Board seems plainly to have held that when contract language is invoked as a defense to the duty to bargain, the language will be judged by *no standard other than* the “clear and unmistakable waiver” one.²⁸

²⁶ 927 F.2d at 640, citations omitted.

²⁷ R. Br. at p. 17, fn. 6, noting Board cases where the Board applied a clear and unmistakable waiver standard even when examining contract language, but holding out Judge Rose’s dicta in *Trojan Yacht*, supra, as evidence of an “inconsistent” approach by “the Board.” I must observe in this latter regard that Judge Rose does not speak for the Board unless and until the Board adopts his decision, and absent such Board adoption or other affirmation, Judge Rose’s decision has no presidential force.

²⁸ See also, e.g., *Reece Corp.*, 294 NLRB 448, 450–451 (1989), and *Southern California Edison Co.*, supra, 284 NLRB 1205 fn. 1, where the Board applied a “clear and unmistakable waiver” standard to the respective employers’ defenses grounded in language of their respective contract’s management-rights and wage clauses, and

Continued

¹⁹ R. Br. at p. 9.

²⁰ Id. at 16; emphasis in original.

²¹ Id. at 17.

²² *Chicago Tribune Publishing Co. v. NLRB*, 974 F.2d 933 (1992).

²³ Id. at 936–937.

²⁴ *Electrical Workers Local 47 (Southern California Edison Co.) v. NLRB*, 927 F.2d 635, 641 (1991).

²⁵ *Trojan Yacht*, Case 4-CA-19851, JD slip op. at 7 (Jan. 13, 1993), citing the 7th Circuit and D.C. Circuit opinions in *Chicago Tribune* and *Electrical Workers Local 47*, supra. I am administratively advised that Judge Rose’s decision is pending before the Board on the General Counsel’s exceptions and the employer’s cross-exceptions.

Accordingly, I remain unpersuaded by the Respondents' claim that a contract interpretation standard (never itself defined, except in supposed contrast to the "clear and unmistakable waiver" standard) takes over where, as here, the labor agreement speaks in some manner to the question at issue. Rather, consistent with *American Diamond Tool*, supra, in reviewing the language of the labor agreement invoked by the Respondents, I will do so as part of a waiver analysis, using the "clear and unmistakable" standard for purposes of judging the waiver issue.

(2) Application of waiver analysis to contract language

I think the Respondents are at their least persuasive when they invoke the "Benefits" sections of the various labor agreements with the various Unions as a basis for claiming waiver. The Respondents emphasize the phrase in article XVII which states, "all of which plans and programs shall be governed by their separate provisions." If this were the only pertinent language, the Respondents would at least have a colorable basis for arguing—as they do—that "the bargain these Unions struck decades ago when they signed off on the contract language" involved a recognition that the "separate provisions [of the Thrift Trust] expressly confer upon the Trustees the power to administer the [Thrift] Plan in accordance with their sole discretion."²⁹ But of course the "governed by their separate provisions" language on which the Respondents focus does not stand alone; rather, it is immediately followed by yet another proviso, to wit: "This provision, however, is not a waiver of such right as the Union has to bargain concerning these plans."

This juxtaposition of ideas—that the plans are "governed by their separate provisions," but that "the Union" does not waive bargaining rights concerning these plans—is, at best, ambiguous in its overall import. At the least, without the aid of extrinsic evidence, I would interpret the paired expressions as intended in *some* manner to preserve "the Union's" rights to bargain about changes to existing benefit plans, including the Thrift Plan. But if the question is, *when* can "the Union" exercise the bargaining rights which are seemingly acknowledged by the latter sentence, the language in question is effectively silent; it provides no guidance whatsoever about either the Respondents' or the Unions' rights concerning *midcontract* changes.³⁰ Thus, the only obvious conclusion I

found in both cases that the language did not satisfy that waiver standard.

²⁹R. Br. at p. 19. Even this is a leap, however, for the Respondents have not established that the Unions had ever seen a copy of the Thrift Trust Declaration, which establishes the trustees' powers. Separately, for reasons I set out more fully in my findings in app. 2, I am not as persuaded as the Respondents are that the Thrift Trust Declaration confers such broad and absolute "full discretion" on the trustees to "administer" the Thrift Plan as they see fit. And this alone might be enough to base a conclusion that the Unions (assuming, arguendo, that they had ever read the Thrift Trust Declaration) did not clearly and unmistakably "sign off" on the Respondents' broad claims concerning the reach of the trustees' powers. Moreover, if the "governed by their separate provisions" language is critical to the Respondents' waiver claims, what are we to make of the fact that this language cannot be found in one of the agreements—the GCIWU agreement with Respondent Exxon Chemical Company?

³⁰Because the contract language is silent about the parties' rights when it comes to midcontract changes to the Thrift Plan, I am no more sympathetic to the General Counsel's and the Unions'

can draw from studying the language in question is that it does not come close to establishing the Respondents' ultimate point—that the Unions "signed off" on a "bargain" whereby the Unions, *during the term of the contract*, would yield either to the Respondents or to the Trustees of the Thrift Trust the right to make whatever changes in traditional Thrift Plan rules, policies, or applications they saw fit to make. Accordingly, I cannot find in the contract language alone a clear and unmistakable waiver by the Unions of what otherwise would be their statutory right to bargain about "material, substantial, and significant" changes to the Thrift Plan.

b. Bargaining history as showing waiver

The Respondents invoke the company minutes of 1964 bargaining between one or more of the Respondents and GCIWU, where, so the minutes indicate, "Management" told GCIWU, *inter alia*, that,

the purpose of the sentence about the Benefits Plans being governed by their separate provisions is to convey the thought that the plans are not subject to bargaining during the term of the contract. The effect of the last two sentences is therefore to provide that any bargaining between the parties on the plans should be done when the contract is open.

There are several frailties in the Respondents' using this remote evidence of bargaining history to establish waiver. One is that the evidence is not only remote, but fragmentary; the minutes introduced by the Respondents represent what one of the Respondents' agents, Clements, was able to unearth after a search into archives of events predating Clements' employment by Exxon, and the minutes he authenticated do not purport to show the complete history of bargaining for the 1964 contract with GCIWU. Another weakness is that the minutes only address relations with GCIWU for an uncertain unit or units of employees, and therefore they do not help the Respondents establish waiver by the other Unions herein. Another is that, being "Management" minutes, which do not purport to be anything like a verbatim transcription of statements made by the bargaining personalities, they may be seen as having a certain self-serving quality. But even setting those difficulties aside, a more fundamental frailty in the minutes is that the contract language "Management" was purporting to construe was, in fact, silent, concerning *when* "the Union" might exercise bargaining rights. All that "Management" was doing was declaring what *its* "purpose" was, and what *it* judged to be the "thought" being "conveyed," and what *it* thought was the "effect" of the language. But critically in this regard, the minutes fail to reveal any affirmative *assent* by "the Union" to "Management's" constructions and declarations of purpose.³¹

counterinterpretations of the language in question as *banning* midcontract changes than I am to the Respondents' claim that the language *authorizes* such changes.

³¹The Board's decision in *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686 (1984), is instructive by contrast. That case, unlike this one, involved a closely litigated bargaining history, which disclosed the specific context in which the "zipper" clause at issue had emerged, and had been separately challenged unsuccessfully by

In fact, the only evidence invoked by the Respondents as indicating that GCIWU embraced “Management’s” construction of the language was the fact that GCIWU eventually “signed-off” on a contract containing the language that “Management” had purported during bargaining to construe. I am not persuaded. As I have already found, the language was *silent* concerning “Management’s” right to make mid-term changes to the Thrift Plan unilaterally, or, alternatively, concerning “the Union’s” bargaining rights in such event. And because the language did not actually speak to the subject of midterm changes and/or GCIWU’s rights in such instances, but *did* refer more generally to GCIWU’s “rights to bargain,” GCIWU could have reasonably judged that these features left “the Union” with a substantial amount of interpretive wriggle room, should the subject of changes to the Thrift Plan (or any other benefit plan) become a live source of controversy at some future date. And in this latter regard, we know that when bargaining parties agree to the inclusion of ambiguous or uncertain language in their contract, they do not necessarily share a common understanding concerning the applicability of that contract language to specific instances; rather, they may prefer to settle their contract with the ambiguity of application outstanding rather than face the alternative—protracted bargaining, perhaps a strike, over the application to specific situations that may never arise during the life of the contract. Therefore, GCIWU’s eventual “signing-off” on a contract containing the facially ambiguous language in question could be seen as a reflection of nothing more than this entirely common phenomenon in collective bargaining, and not necessarily, nor even probably, as an adoption of “Management’s” declared constructions of the “purpose” or the “thought conveyed,” or the “effect” of the language.³²

c. Past practice; historical acquiescence by the Unions in earlier “changes” to the Thrift Plan

As I elaborate in appendix 2, the Respondents introduced a summary exhibit reflecting a total of 128 “Benefit Plan Changes” made through previous decades. This includes roughly 49 change items associated with the Thrift Plan. (This latter total includes two changes which traced from “amendments” to the Trust Declaration made by Exxon, not from “administrative changes” by the trustees, and also in-

the union as an 8(a)(5) violation before the union eventually acquiesced in the inclusion of the clause in the new agreement. Moreover, in an administrative appeal associated with its earlier unfair labor practice charge, the union had specifically acknowledged that the “zipper” clause in question was so broad as to bar future bargaining over even not specifically mentioned “practices.” And this was specifically cited by the Board majority as one of the “factors” which “constitute[d] evidence that the Union was fully aware that all previous agreements were subject to the zipper clause.” *Id.* at 687 fn. 3.

³²Moreover, even if I were to give more weight to “Management’s” statements of the “purpose” or “effect” of the language than I am inclined to give them, I note that “Management” emphasized that, under the language, “the Union would not have the right to take the Company to arbitration if the parties fail to reach agreement concerning the changes.” Clearly, we are not presented here with the question of the Unions’ arbitration rights over such changes, but rather with its rights to maintain an unfair labor practice charge before the Board that such changes violated the Act, if made unilaterally. Even the minutes are silent on this latter question.

cludes the seven September and January changes first announced to the Unions on August 12, 1992.) The Respondents invoke the Unions’ historical acquiescence in these changes as additional evidence of waiver. As I discuss next, there are at least two, largely independent, difficulties with relying on union acquiescence in previous changes as a waiver of the right to bargain over yet additional changes:

One difficulty relates to the peculiar facts herein: The historical “administrative changes” to the Thrift Plan, so far as I can discern (see my further findings in app. 2) never involved “takeaways,” as I have earlier used that term. Indeed, as I have previously found in summary, they involved changes that might best be characterized as involving “additions” or “enhancements” to the benefits offered under the Thrift Plan, or perhaps in some cases as involving “merely particularizations of, or delineations of means for carrying out, an established rule or practice,” as the Board applied that notion in *Bath Iron Works*, supra. Put another way, I cannot find in any of the previous “administrative changes” invoked by the Respondents any “precedent,” directly or by analogy, for the two changes with which we are ultimately concerned, that is, a substantial reduction in the number of allowable simultaneous loans, or an even more substantial increase in the minimum allowable loan amount. Thus, the Unions’ historical acquiescence in other kinds of benefit-enhancing changes does not necessarily, nor even probably, signify that the Unions intended forever to cede to the Respondents the right to make whatever changes they might see fit to introduce in the future, particularly changes which might amount to “takeaways.”

Another difficulty with the Respondents’ reliance on the Unions’ historical acquiescence is a more fundamental one, which recognizes that each new change creates a new status quo, a new set of terms and conditions of employment, from which the employer may not depart without additional notice to and bargaining with the union. The point is well expressed by the Board in *Bath Iron Works*, supra, as follows:

The mere fact that a union has previously acquiesced in an employer’s unilateral implementation of plant rules does not, however, mean that the employer is free thereafter to implement different plant rules or significant and material changes in existing plant rules without giving the union notice and an opportunity to bargain. “A union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.”³³

The Ninth Circuit expressed the same notion this way in *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (1969):

Each time the bargainable incident occurs—each time new rules are issued—[the] Union has the election of requesting negotiations or not.

Thus, union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are

³³ 302 NLRB 898, 900–901, quoting *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987); other citations omitted.

similar to those in which the union may have acquiesced in the past.

d. *Aggregating all these factors does not change the result*

In *American Diamond Tool*, supra, the Board affirmed that a “combination” of facts and circumstances may suffice to establish waiver even where each fact or circumstance, standing alone, might be inconclusive on the point.³⁴ This affirmation, although easy to state, is less easy to understand analytically, for if “clear and unmistakable waiver” is ultimately what is sought to be proved, one may reasonably ask how it could be that even a variety of facts, no one of which clearly or unmistakably points in the direction of waiver, could nevertheless “add up” to a clear and unmistakable waiver. Setting such doubts aside, I have done my best to apply this dictum. Having done so, I continue to find the variety of facts and circumstances cited by the Respondents to be at least as inconclusive in the aggregate as they were in their individual particulars. Thus, where the various contracts were silent about the central question of the parties’ respective rights concerning midterm changes to the Thrift Plan, and where the bargaining history never showed that any of the Unions, much less all of them, had affirmatively assented to “Management’s” once-expressed construction of the meaning of the benefits language, and where the past practice of the parties showed, at most, union acquiescence in prior changes of a substantially different character from items (c) and (d) changes now in question, these circumstances do not collectively establish in my final judgment that the Unions had ever “fully discussed,” or “consciously explored,” much less “consciously yielded,” or “clearly and unmistakably waived [their] interest” in bargaining over any midterm takeaways in benefits under the Thrift Plan that the Respondents might wish to implement.³⁵

e. *Neither does the Respondents’ invocation of “compelling legal and practical considerations”*

The Respondents devote a section of their brief to the lead proposition that “The Company’s [sic] Refusal to Bargain is Supported by Compelling Legal and Practical Considerations.”³⁶ Within this section they explain in some detail why “there are numerous undeniable advantages to maintaining a *uniform Thrift Plan available on the same terms to all employees Company-wide*.”³⁷ And with at least some plausibility they argue that “[n]egotiating special treatment for a

selected group of employees would effectively destroy these advantages [because] the costs of administering the plan would go up[,]” and “render the administration of the Plan far more difficult and less efficient, ultimately resulting in diminution of the value to the Plan to all participants.”³⁸ The Respondents also posit a “scenario” under which “providing special treatment to a segment of represented employees [would raise] difficult questions concerning the Trustee’s fiduciary obligations.”³⁹

The Respondents’ concerns are not frivolous, and the “troubling questions” they have posed to me are intriguing ones, although I do not propose to answer them, except insofar as my findings, supra, and my proposed remedy, infra, have rendered some of them moot, and have rendered others matters for possible consideration in another case on another day. But simply put, the Respondents have called my attention to no authority—and I am aware of none—which would authorize reliance on such concerns as a basis for dismissing an otherwise meritorious complaint. In addition, my findings, analyses, and my proposed remedy cannot and do not purport to address what the “Company” (i.e., Exxon Corporation), or what “the Trustee,” should have done in the past or must do now. Rather, consistent with the Regional Director’s charge-docketing and complaint approach—which, for better or worse, treats what amounts to a single case centrally involving behavior by Exxon and the trustees of the Thrift Trust as instead *10 cases* involving neither of those actors, but only the four Exxon subentities as separate employer-respondents, and as the only perpetrators of the alleged unfair labor practices—I am addressing only what the Respondents, as the nominal employers of the 1900 bargaining unit employees concerned here, did wrong, and what *they*, as such “employers” may and must do by way of remedy.⁴⁰

In any case, I would not presume, as the Respondents do, that the *only* ways to give the Unions the bargaining rights contemplated by this decision would be either to balkanize the hitherto uniform Thrift Plan, on the one hand, or, on the other, to engage in a wholesale discontinuance of Thrift Plan coverage for employees represented by the Unions, and require the Unions to bargain an entirely separate counterpart plan. When good-faith collective bargaining is conducted, the bargaining parties often discover other ways to skin the cat than the ways they originally supposed were available; and obviously, bargaining over the matters in question could lead to a variety of possible lawful outcomes. One of these might be that Exxon or the trustees, although not directly bound by the Order herein, might, after good-faith bargaining between the Respondents and the Unions, find merit to some or all of the positions taken by the Unions, and therefore choose to amend or “administratively change” the Thrift Plan as it affects all employees within the Exxon family. Another of

³⁴ 306 NLRB at 570–571, where the Board further held that, “collectively,” a variety of facts showed that “the Union had an opportunity to request bargaining about unilateral layoffs by the Respondent, failed without excuse to do so, and *expressly signaled its willingness to permit such conduct in the future*.” Id. at 571, emphasis added. I emphasize, however, that the facts of *American Diamond Tool* do not in any material way resemble those presented herein, particularly insofar as nothing in the record can be taken as an “express signal” by the Unions of their “willingness to permit” unilateral action affecting Thrift Plan benefits “in the future.”

³⁵ *Reece Corp.*, supra, 294 NLRB at 451, adapting and quoting from *Park Ohio Industries v. NLRB*, 702 F.2d 624, 628 (6th Cir. 1983). See also, e.g., *Angelus Block Co.*, 250 NLRB 868, 877 (1980); *GTE Automatic*, 261 NLRB 1491, 1492 (1982).

³⁶ R. Br. at 25–27.

³⁷ Id. at 25; emphasis added.

³⁸ Id. at 26.

³⁹ Id. at 26; emphasis added.

⁴⁰ I did not create the essentially fictional concept, observed historically by the parties, and apparently adopted by the Regional Director, under which the Respondents—and only the Respondents—are treated as the “employers” of the 1900 employees working the various Houston area bargaining units. And as I note further in my discussion of the remedy, I find myself bound to continue to observe this fiction where the General Counsel has himself limited the complaint to attacks on the Respondents’ behavior, and only their behavior.

many possible outcomes to the kind of bargaining required by this Order might be that the Unions themselves, given full standing and opportunity to bargain, might find substantial merit to the Respondents' concerns, and ultimately agree that trustee-mandated changes can be implemented in the units for which they speak without injury to the interests of the employees they represent. And of course nothing in my Order bars the Respondents from implementing changes to the Thrift Plan imposed from above if, after good-faith bargaining, the parties reach lawful impasse.

Accordingly, I reach these conclusions of law concerning the 8(a)(5) counts in the complaint: When, after October 27, 1992, the Respondents refused to bargain with the Unions, the exclusive representatives of their employees in the various units involved herein, about items (c) and (d) features of the January changes, and when the Respondents thereafter implemented those two features unilaterally, the Respondents, and each of them, contravened their statutory duty to bargain collectively in good faith with the Unions over mandatory bargaining subjects, and thereby violated Section 8(a)(5), and derivatively Section 8(a)(1), of the Act.

B. Clements' November 17 Statements as a Violation of Section 8(a)(1)

As I have found, in the November 17 meeting of the parties, Clements told the Unions' representatives, themselves "employees," in substance, that if the Unions persisted in their bargaining demands, this would injure the parties' overall bargaining "relationship," and (making the point more clear), that any such bargaining would necessarily start from a "blank sheet." The General Counsel treats these remarks as the kinds of "bargaining from scratch" statements which the Board has traditionally proscribed because they convey a message that the employer intends to punish the represented employees and their union for asserting statutory rights, either by withdrawing existing benefits even before negotiations begin, or by adopting a "regressive bargaining posture designed to force a reduction of existing benefits."⁴¹

The Respondents, never conceding that Clements even referred to a "blank sheet," argue in the alternative that if Clements used the "blank sheet" expression, it should not be taken as involving any "threat of reprisal." Why? Because, say the Respondents, the parties have a "mature bargaining relationship," in which "the Company pays due respect to the Unions as bargaining representatives for their respective employees," evidenced by its willingness to "discuss" prospective Thrift Plan changes with the Unions before making a "general announcement to all employees."⁴² Also, say the Respondents, the "purpose and tone" of the November meeting "strongly suggest" the absence of any

"coercion."⁴³ Moreover, they say, "[t]he Company never said that it would refuse to bargain about the Plan."⁴⁴

I think the General Counsel is far closer to the mark in arguing that Clements' remarks would reasonably be treated by his employee listeners as conveying an unlawfully punitive message, essentially, that the employees would be worse off than they were now as a consequence of any bargaining about the subject of changes to the Thrift Plan. After all, the company minutes of 1964 bargaining with GCIWU show that "Management" told "the Union" long ago that "if the Union insisted upon bargaining, as distinguished from discussing a plan, it *would discontinue all the plans with respect to that group* and bargain for new plans [and that] the [GCIWU-represented] group *would not fare as well*" under that scenario. I note that these statements did not merely predict the "possibility" that GCIWU's seeking to bargain *might* eventually yield a "discontinu[ance]" of the plan sought to be bargained about, but that GCIWU's mere "insist[ence] upon bargaining" *would* cause such a discontinuance. Similarly, "Management" did not merely predict the "possibility" that employees *might* not "fare as well"; it declared that they "*would not fare as well*." Thus, it is not hard to imagine that Clements, who had admittedly unearthed the same minutes as part of his research into company archives, would seek in November 1992 to repeat to all the Unions essentially the same message that "Management" had conveyed to GCIWU in 1964. And in these circumstances, the Unions' agents at the November 17 meeting can be forgiven for hearing in Clements' remarks essentially the same message, of the *inevitability* of loss of existing benefits if the Unions persisted in their demands.⁴⁵

By contrast, the Respondents' defensive claims, *supra*, appear strained and insubstantial. They either rely on essentially meaningless generalities about the "matur[ity]" of the parties' "bargaining relationship," or on hard-to-swallow characterizations of the "purpose and tone" of the November 17 meeting, or they simply avoid the question by toppling straw men. ("The Company never said that it would *refuse to bargain* about the Plan.") Moreover, insofar as the Respondents rely on the "complete absence of any union animus on the Company's part," they are merely hoping, contrary to my conclusions, *supra*, that they would not be found guilty of an unfair labor practice in having refused to bargain over the changes in question, an unfair labor practice that is itself adequate to supply "animus," assuming, *arguendo*, that this element were critical to the finding of a violation of Section 8(a)(1).

Accordingly, I reach this conclusion of law about the 8(a)(1) count in the complaint: When Clements effectively told the Unions' agents on November 17 that their demands to bargain about the changes in question *would* injure the parties' bargaining relationship, and that any bargaining *would* start with a "blank sheet," the Respondents, and each

⁴¹ See, e.g., *Coach & Equipment Sales Corp.*, 228 NLRB 440, 441 (1977):

"Bargaining from scratch" is a dangerous phrase which carries within it the seed of a threat that the employer will be punitively intransigent. . . . [W]here a bargaining-from-scratch statement can reasonably be read in context as a threat . . . to unilaterally discontinue existing benefits prior to negotiations, or to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees . . . the Board will find a violation.

⁴² R. Br. at p. 24.

⁴³ Id. at 24-25.

⁴⁴ Id. at 25.

⁴⁵ Although the subjective reactions of the Unions' agents at the meeting are not dispositive here, I note that one of them who testified (Evans) understood Clements to be saying, effectively, that employees "would end up with less than what [they] had to begin with[.]" and another (Maris) inferred that the parties "would be negotiating the whole policy, and it would come out less than what it was."

of them, interfered with, restrained, and coerced employees in the exercise of Section 7 rights, and thereby violated Section 8(a)(1) of the Act.

REMEDY

My previous findings and analyses have to some extent foreshadowed my approach to questions of remedy. Having found that the Respondents violated Section 8(a)(1) and (5) in certain respects, I deem it essential to the remedy that the Respondents be ordered to cease and desist from committing those violations or like or related ones in the future. I regard it as similarly essential to order the Respondents to take certain affirmative action, to post an appropriate notice to employees, and, on the request of any or all of the Unions, to bargain over the effects on employees represented by the requesting Union or Unions of their January 1, 1993 implementation of items (c) and (d) changes to the Thrift Plan.

Orders to restore the status quo ante, *and* to “make whole” employees who suffered losses as a result of an employer’s unilateral change are customarily additional affirmative features of the remedy for a unilateral change violation. And some such remedy is apparently sought by the General Counsel, although it is now evident to me that the prosecution still has not come to grips with *what* is sought in this respect, or *how* these Respondents might practically effect a “restoration” or a “make whole” remedy. I attempted to push on some of these questions during trial colloquy with the General Counsel; the results were less than illuminating. Thus (emphasis added):

JUDGE NELSON: . . . I do want to ask, before we break for lunch, what remedy the prosecution is going to be seeking in this case, provided it prevails.

MS. GANT: We are simply seeking rescission [sic] of the changes that were implemented January 1, 1993, and bargaining in good faith with regard to any changes that Respondents desire to implement.

JUDGE NELSON: Rescission?

MS. GANT: Rescission.

JUDGE NELSON: Anything in the area of make whole?

MS. GANT: Well, that is going to entail, *probably*, some make whole to the extent that loans may have been denied because of the decrease in the loans allowable. Obviously, they can’t go back and give somebody a loan as of January 1, but they can offer someone an additional loan now, *if* that kind of thing took place.

JUDGE NELSON: Well, it is those kinds of questions that have been running through my mind. And I just wonder if it has been thought out to the point of a specific proposal . . . Have you ever gotten down to anything that fine?

MS. GANT: Well, you—we haven’t, Your Honor—

MS. GANT: No. It is our position that *if* persons have been adversely impacted by this, that they should be made whole *to the extent that it is possible at this point*.

JUDGE NELSON: So rescission and reinstate—rescind changes, and reinstate old terms?

MS. GANT: Correct.

JUDGE NELSON: And lessen—

MS. GANT: Reinstate those terms as of January 1, 1993, and *to the extent that it is possible, make whole* all those people that were adversely impacted by those changes.

JUDGE NELSON: . . . I have asked myself the same question you did. So if somebody didn’t get a loan, what is the Government going to make the company do to fix that?

MS. GANT: Well, for example, the maximum allowable number of loans was reduced from four to two. If someone had two loans outstanding at any time in the period between January 1, 1993, and the present, and requested an additional loan, you know, it is our position that Respondents should be required to *offer them that loan at such time as, you know, they are ordered to do so*, as we prevail.

That is not going to put them fully, you know, in the position they would have been in, absent this unilateral change, but it is really about the best they can do at this point.

JUDGE NELSON: So people who asked but were turned down; but not people who thought about it but decided against it, because they saw the new rule?

MS. GANT: Correct. I mean I think that is pretty speculative. And, you know, it—and there may be validity to some of—I mean there may be people out there who genuinely—and I think there are people out there who genuinely were dissuaded from even applying.

JUDGE NELSON: But they are not going to be made whole for anything?

MS. GANT: Well, I think it tends to border on getting pretty speculative at that point.

JUDGE NELSON: Okay.

MS. GANT: Anybody could come forward and assert—and I mean I understand the—you know, from Respondents’ position, they could have the whole bargaining unit come forth and say, Hey, I thought about it; I want one.

JUDGE NELSON: The reason I ask is because—

MS. GANT: This is our window period; this is open season.

JUDGE NELSON: Looking around several corners that we may never have to look around, I mean I may sustain Respondents’ position. If I sustain the Government’s position, I envisioned in some of my more imaginative fantasies about what might happen[:] a compliance proceeding that might go on into the 21st century.

The General Counsel still does not appear to have really confronted the questions associated with the prosecution’s seeking of a remedy involving “rescission” of changes and “reinstatement” of former terms and conditions by these Respondents. Thus, on brief, prosecuting counsel says this—and only this—about the remedy:

Accordingly, the Honorable Administrative Law Judge is asked to . . . issue an order directing *Respondents* to *rescind* the changes implemented unilaterally on or about January 1, 1993; *reinstitute the former benefits; and retroactively grant rights under said former bene-*

fits, back to January 1, 1993. Additionally, the General Counsel specifically requests that Respondents be ordered to post an appropriate Notice to employees, along with such other and further relief as the Judge may deem just and proper.⁴⁶

What the General Counsel ignores when she talks about ordering *the Respondents* to “rescind” changes, and to “re-institute the former benefits” and to “retroactively grant rights under said former benefits” is that the changes were made to an Exxon Corporation Thrift Plan, itself operating within the framework of the Thrift Trust, whose behavior can be changed only by an Exxon-initiated “amendment” to the Trust, or by action of the trustee(s) of the Trust. Put another way, the General Counsel ignores that *the Respondents* have no powers whatsoever to “rescind” a change ordered by the trustee(s), nor in any other manner to compel the “reinstitution” of a “benefit” under the Thrift Plan itself. To achieve *those* kinds of results requires action by the trustee(s), or perhaps by Exxon Corporation itself, as the trustor with powers both to “amend” the Trust Declaration, and powers to remove trustees and replace them, if need be, with ones willing to effect such results. And therefore, if the General Counsel wished to achieve such results, the Regional Director might have chosen when issuing the complaint to name the Thrift Trust, and/or its trustee(s), and/or Exxon Corporation as “respondents,” or otherwise implead them as “necessary parties” to the effectuation of such remedies. But the General Counsel apparently chose to frame the case in a different form. And in such circumstances, due process considerations effectively bar the General Counsel from now seeking, or me from now entering, a remedial order directing action by parties never put on notice that the Board would be asked to subject them to such an order.⁴⁷ Moreover, an additional consideration, my duty not to “intrude on the General Counsel’s authority to frame the case,”⁴⁸ effectively prevents me from reaching beyond the complaint to enmesh further parties in a remedial order.⁴⁹ Accordingly, I will not enter an order requiring the Respondents to do something that they manifestly have no power to do; neither will I overreach the complaint by ordering parties not named therein to take affirmative action.

[Recommended Order omitted from publication.]

⁴⁶ Id. at 27; emphasis added.

⁴⁷ See, e.g., *Teamsters Local 227 (American Bakeries)*, 236 NLRB 656 (1978); *Mobile Oil Corp.*, 219 NLRB 511 (1975).

⁴⁸ *Maintenance Service Corp.*, 275 NLRB 1422, 1425–1426 (1985).

⁴⁹ See also *Florida Steel Corp.*, 224 NLRB 45 fn. 2 (1976), where the Board expressed an “unwillingness to circumvent the General Counsel’s authority” by finding a “discriminatory application” of a no-solicitation rule where the complaint had alleged only that the rule had been unlawfully “promulgated and enforced.”

APPENDIX 2

Details

I. THE RESPONDENTS’ OPERATIONS AND LABOR RELATIONSHIPS IN THE HOUSTON AREA

Each of the Respondents—Exxon Company, USA (EUSA), Exxon Chemical Company (ECC), Exxon Chemical

Americas (ECA), and Exxon Research & Engineering Company (ERE)—is owned and controlled by Exxon, three of them as Exxon “divisions” (EUSA, ECC, and ECA), and one (ERE) as a separate corporate “subsidiary.” Three of them—EUSA, ECA, and ERE—conduct operations in a petroleum and petrochemical refinery and research and engineering complex in Baytown, Texas, near Houston (the Baytown Refinery). The fourth—ECC—operates a chemical manufacturing plant within Houston.

The four Unions—Gulf Coast Industrial Workers Union (GCIWU), Baytown Employees’ Federation (BEF), International Association of Machinists & Aerospace Workers, Lodge 1051 (IAM), and International Brotherhood of Electrical Workers Local No. 527, AFL–CIO (IBEW)—represent in all at least 1900 employees in these Houston area operations,¹ in 10 distinct bargaining units (some of them combined units of employees of more than 1 Respondent), which were established decades ago, based either on Board certifications or voluntary recognition arrangements.² In the period when the Respondents are alleged to have committed unfair labor practices, each of these 10 units was covered by a current labor agreement between 1 of the Unions and 1 or more of the Respondents.³

II. THE “EXXON FAMILY”; EXXON’S CONTROL OF LABOR RELATIONS AND ADMINISTRATION OF THE THRIFT PLAN VIA EUSA’S HUMAN RESOURCES DEPARTMENT

For charge docketing and complaint purposes, the Regional Director has chosen to treat each of the Respondents as a separate “employer,” even though three of them are simply divisions of a common, corporate employing entity—

¹ The number “1,900” was used by EUSA’s Clements to refer to the number of employees at the “Baytown refinery.” The same number was used by Clements’ superior, Rouse, as the total number of employees represented by all of the Unions herein, presumably including the employees of ECC’s Houston chemical plant.

² Jt. Exh. 1—the parties’ stipulation of facts—sets forth the lengthy and complex individual unit descriptions in full. Summarizing from that exhibit: (1) GCIWU represents certain employees of ERE in two units; it also represents a combined unit of employees of EUSA and ECA, and a fourth unit of employees of ECC. (2) BEF represents two distinct units of combined employees of EUSA and ECA. (3) IAM represents a combined unit of employees of EUSA and ECA. (4) IBEW represents a unit of employees of EUSA and another unit of employees of ECA.

³ Copies of the 10 agreements between the various Unions and the various Respondents were attached to the parties stipulation, supra, Exhs. 1(D) through (M). The stipulation recites at par. 8 that these attached agreements comprise “all current . . . agreements” between the various parties. Based on the stipulation, I find that all 10 attached agreements were in effect in the relevant October 1992–January 1993 period, even though 4 of them—Jt. Exhs. 1(G), (H), (L), and (M)—were due to expire by their terms years before that period began, unless renewed by some device. Thus, Exhs. 1(G) and (H), agreements between BEF and EUSA for two different units, purport to cover the period “March 15, 1987 until . . . March 15, 1989, and for consecutive one-year periods thereafter, unless terminated . . . by written notice . . . on or before January 15, 1989, or on or before the fifteenth day of January of any subsequent contract year.” And Exhs. 1(L) and (M), agreements between IBEW, EUSA, and ECA for two different units, purport to cover the period “September 5, 1980 . . . through April 5, 1983, and from year to year thereafter unless terminated or changed as hereinafter provided.”

Exxon—and the fourth, although having distinct corporate form, is likewise owned and controlled by Exxon, and even though the Respondents are alleged to have commonly committed the same set of violations by implementing the January changes to the Exxon-wide Thrift Plan. One unfortunate consequence of this approach (beyond the distraction of a two-page formal case caption) is that it tends to obscure what is otherwise clear and undisputed—that the Respondents are not, in fact, autonomous entities, at least not for labor relations purposes or for Thrift Plan administration purposes. Rather, they are members of what Exxon's top human resources manager, EUSA's James Rouse, called the "Exxon family," which family includes an uncertain number of Exxon companies around the country, employing a total of about 35,000 "U.S. dollar-paid employees." Moreover, it appears that the Respondents are not siblings of equal standing within the Exxon family, at least not for labor relations or Thrift Plan purposes. Rather, EUSA's human resources office in downtown Houston, headed by Rouse, apparently supervises labor relations activities conducted at each of the companies within the Exxon family, and also supervises the administration of the Thrift Plan nationwide.⁴ Similarly, tightening the focus to the Respondents' Houston area operations, another EUSA official, David Clements, who reports to Rouse, is the "human resources manager at the Baytown refinery," and is seemingly responsible for all labor relations and other "personnel" matters involving not just the three Respondents that operate in Baytown, but also the fourth Respondent—ECC—which has its plant within Houston.⁵ Thus, Clements admittedly served as the chief spokesperson for the Respondents in negotiating all or nearly all their current labor agreements with the Unions,⁶ and he admittedly spoke

⁴Rouse identified himself as "the chief human resources official for the company, which involves the overseeing of our benefits [including the Thrift Plan], compensation, labor relations, college recruiting, management training, EEO administration—all types of human resources activities." (Although his testimony admits of a more limited interpretation, I infer that when he here used the term "company," Rouse was referring not just to the EUSA "division" of Exxon, but to Exxon itself. Thus, later elaborating on his role of "overseeing . . . benefits," he said he was the "administrator of benefits for Exxon Corporation, for the entire corporation.") And elsewhere, he noted that "Exxon USA" (seemingly referring to all of Exxon's operations in the United States, and not simply to EUSA's operations) has dealings with "about 30 unions across the nation" and that people on his own staff report to him concerning "labor relations and planning" for all these operations.

⁵Asked to describe his "responsibilities," Clements replied, "Similar to the way Jim Rouse testified from a company standpoint, I have similar responsibilities for the Baytown Refinery and its 1900 employees. I also have responsibility for the public affairs activity and health services activities at the refinery, along with all of the human resources activities. That includes labor, compensation, recruiting employment, affirmative action, et cetera."

⁶Clements qualified his admitted "chief negotiator" function for all the Respondents by saying that, "as a technical matter," he "[did] not, per se, negotiate the chem plant contract with the GCIWU." But he added, "I mean as a practical matter in years past, we have sat in on both negotiations and have spoken as one in most instances." (The "chem plant" Clements was referring to here was apparently ECA's Baytown plant, not ECC's Houston plant, because Clements identified Michael Payne, as having been "in charge" of those negotiations, and Payne, also a witness, identified himself as

for all of the Respondents during meetings with the Unions, infra, relating to changes in the Thrift Plan.

Accordingly, despite the complaint's depiction of the Respondents as separate and distinct employers, and its failure to name Exxon itself as a party-respondent, it is difficult to resist characterizing the Respondents as having acted merely as subordinate arms of a single employing entity, Exxon Corporation, which corporation was more often than not what the Respondents' common attorneys—and their witnesses—were referring to when they used the expression, "the Company."⁷ And for this reason, I will not normally find it fruitful hereafter to distinguish among the Respondents when describing their behavior, and will sometimes simply refer to them (or to Exxon itself) as "the company."

III. EXXON'S THRIFT PLAN; THE THRIFT TRUST; PRESUMED TRUSTEE POWERS TO MAKE "ADMINISTRATIVE CHANGES"

For several decades, under the umbrella name "Exxon Benefit Plan," Exxon has provided a variety of individual benefit plans, including the Thrift Plan, to nearly all of the 35,000 employees within the Exxon family, including to the Respondents' 1900 employees represented by the Unions in the Houston area.⁸ Under the Thrift Plan in its more recent form, participating employees may contribute portions of their earnings through payroll deductions, matched by Exxon contributions up to certain limits, into one or more savings or investment arrangements. Thus, contributions may be directed to buy "Equity Units" in a kind of stock mutual fund selected from *Standard and Poor* listings, or shares in a "Common Asset" (cash) money fund; or employees may divert payroll earnings to a "Direct Dividend Account" (DDA), an employee stock ownership plan (ESOP) available since at least 1988, which requires, according to an Exxon Thrift Plan bulletin, that such employee contributions "by law be invested primarily . . . in shares of Exxon stock."⁹ In addition, the Thrift Plan allows participants to take out loans from the Thrift Fund, apparently at lower rates than employees could get from commercial lenders. As previously noted, EUSA's Rouse, the human resources manager for the Exxon family of companies, is also the designated Thrift

the human resources manager for ECA, responsible for the "Baytown chem plant.")

⁷That the individual Respondents functioned in this case as a collective "company" is largely conceded in the Respondents' common brief, where the Respondents are called collectively "the Company" (id. at 1), and actions taken by an agent nominally employed by only one of the Respondents, or identical actions taken by agents of the separate Respondents, are labeled, simply, actions by "the Company" (e.g., id. at 2, 6). Indeed, the Respondents' attorneys often had Exxon itself in mind when they used the expression "the company." Thus, on brief (pp. 3-4), they refer to "[t]he Company's Benefit Plan," which they identify as having been created as the "Exxon Benefit Plan," which is "Company-wide" in scope, and "cover[s] substantially all of Exxon's employees." Other such examples abound.

⁸According to Rouse, about 9300 of the 35,000 employees within the Exxon family are union represented, and are likewise participants in the Thrift Plan.

⁹Jt. Exh. 1, attachment A, p. 5. Rouse testified that if employee contributions go to buy Exxon stock under the DDA option, Exxon pays a higher share of the total contribution than when employees opt to invest in Equity Units or in the Common Asset fund.

Plan administrator, and in that capacity he has been responsible for the proper handling of “thousands” of transactions conducted by Exxon family employees under the Thrift Plan each year.

The Thrift Plan is the creature of an employee savings and investment trust (Thrift Trust). The Thrift Trust is a creature of Exxon itself. (More precisely, according to Rouse, the Thrift Trust was originally created in 1935 by Exxon’s original corporate incarnation, Standard Oil Company of New Jersey, which “changed its name” to Exxon Corporation in 1972 or 1973, after having undergone an intermediate existence as “Humble Oil and Refining Company.”¹⁰) According to Rouse, the Thrift Trust controls total Thrift Fund assets “pushing \$6 billion,” and “[a]bout 45 percent of [those assets are held] in stock,” including in Exxon stock. Rouse “believe[d]” that the Thrift Trust “may be if not the major holder, certainly one of the major holders of Exxon stock in the world today.”

Under the Thrift Trust Declaration of Trust (Declaration), Exxon, as trustor, “may at any time, and from time to time, amend or terminate this Trust, in whole or in part, except as stated in [two immediately following paragraphs],”¹¹ Exxon also has virtually unbridled powers as trustor under the Declaration to appoint, remove, and replace trustees. All the times that concern us, there were five such trustees, apparently holding that position on an ex officio basis, that is, by virtue of their status as officials of Exxon or of a company within the Exxon family.¹² The trustees themselves have no power to “amend” the Trust—only Exxon does—but they have historically assumed that they have the power to make “administrative changes” in the way the Thrift Plan operates.

This notion of “administrative changes,” deserves a brief digression: In litigating and briefing these cases, the Respondents’ attorneys have made rather a point of insisting that the changes at issue herein were all “administrative” in nature, and that they did not require any “amendment” to the Declaration.¹³ I remain unsure, however, of the Respond-

ents’ ultimate point in so labeling the changes. Certainly, this represents an implicit concession that the changes in question did *not* arise as a consequence of an Exxon-initiated amendment to the Declaration, and the record affirmatively shows that this is so in any case.¹⁴ The Respondents, however, also may be seeking a finding that the Declaration authorized the trustees to make the types of changes now in question, if so, I am hesitant to do reach so far. I observe that the trustees’ assumed general powers to make “administrative changes” is not stated clearly in the Declaration, which nowhere uses this expression. Nevertheless, section 11.4 of the Declaration *does* say this (emphasis in original):

The Trustee shall have any additional powers that it may deemed [sic] appropriate for full and complete management of the *Thrift Fund* and to carry out the purposes of this Trust.¹⁵

And two other provisions in that instrument may also authorize the trustees to make *some* types of “changes.” Thus, section 7.6 of the instrument, dealing with “Value and Price” of “Equity Units,” requires the “Trustee” to “establish periodic valuation times.” And section 9, dealing with “Loans to Participants,” states:

If an *active participant*, during the preceding six months, has not borrowed any amount under this part, then *to the extent and on the terms permitted by the Trustee*, such *participant* may at any time borrow from the Trustee any amount of cash the *participant* specifies, but not in excess of one-half of the *accrued collateral value of the participant’s Thrift Fund Account* on the date the loan is granted.¹⁶

Thus, I cannot find that trustees operate under a general warrant to make “administrative changes” of the type now in question. Moreover, even if they do, I can’t see how this aids the Respondents’ defenses to the complaint, which focuses on the *Respondents’* duties to bargain with the Unions before *implementing* such changes. Nevertheless, for all purposes in my decision and in this appendix, I have assumed for argument’s sake that the trustees’ powers under the Declaration

¹⁰ According to Rouse, sometime in the 1950s or early 1960s, “all of the domestic affiliates that Standard Oil of New Jersey had were merged into one company called then the Humble Oil and Refining Company.”

¹¹ The “exceptions” to Exxon’s power to amend, terminate, or partly terminate the Thrift Trust (or to do the same to “any *thrift plan* implemented by this Trust”), require that any such actions “must not . . . deprive any *participant* of any amount already credited to the *participant’s* accounts, or . . . permit any portion of the *Thrift Fund* to revert to any employer or be used for, or diverted to, purposes other than for the exclusive benefit of *participants* and their beneficiaries.” (R. Exh. 1, pp. 40–41; secs. 20.1–20.3; emphasis in original.) But these exceptions are qualified by an overriding proviso allowing Exxon to “amend or terminate this Trust in whole or in part,” if, in Exxon’s “opinion,” a “law . . . affects the operation of any of the provisions of this Trust or materially affects the tax status of this Trust, and [Exxon] deems it advisable to amend or terminate this Trust . . . to conform to such law.”

¹² Rouse appeared to be describing an ex officio trusteeship when he said, “These trustees are selected by their position in the company, rather than as a specific individual.” And again, I presume that Rouse meant Exxon, or the Exxon family, when he used the term “company.”

¹³ The expression, “administrative changes,” incidentally, was one introduced not spontaneously or comfortably by the Respondents’ witnesses, but chiefly by the Respondents’ attorneys, who seek to

define it on brief (p. 6) in the following three (quite circular) sentences:

Changes that do not require a modification to the language of the Thrift Plan are administrative changes and may be accomplished by the Thrift Trustee. . . . That is, changes in the operation of the Thrift Plan implemented by the Trustee pursuant to the existing Thrift Plan documents are administrative changes. Consequently, if the Trustee wishes to implement a change and is empowered to take that action pursuant to the existing plan document, that change is administrative in nature.

¹⁴ I have made no attempt to construe the lengthy (46-page) and complex Declaration to determine whether the changes that concern us did or did not require first an authorizing “amendment” to that instrument by Exxon itself.

¹⁵ Nowhere in the Declaration can I find any explicit statement of the Trust’s “purposes.” Neither is it obvious what the expression “full and complete management of the Thrift Fund” might intend or entail. Thus, I would hesitate to find in this provision any plain authorization to the trustees to make the “administrative changes” called into question by the complaint in this case.

¹⁶ Emphasis in the original; the bold italics are mine.

include the right to make changes such as those which centrally concern us in this case.

IV. THE SEPTEMBER AND JANUARY CHANGES IN SUMMARY; AUGUST 12 MEETING OF ALL PARTIES; LATER UNION BARGAINING DEMANDS

Following an uncertain internal process, the Thrift Plan trustees apparently decided sometime in 1992 to authorize a total of seven changes to the Thrift Plan. Two of these—limiting stock “trading frequency” to once a month and eliminating “automatic withdrawals” from the participants’ accounts—were due to be implemented on September 1. The remaining five were to be implemented on January 1, 1993, as follows:

- (a) DDA Diversification Distributions (available under ESOP law to employees over 55 with at least 10 years of Thrift Plan participation) would become available in the form of either cash or stock.
- (b) Loan repayment schedules would be extended from 48 months to a maximum of 60 months.
- (c) The number of allowable loans outstanding simultaneously would be reduced from four to two.
- (d) The minimum allowed loan amount would increase from \$40.00 to \$1,000.00.
- (e) Daily Valuation of Equity Units would begin.

The Respondents got orders from above (precisely from whom is uncertain¹⁷) to preadvise the Unions and the employees in the Houston area operations of the intended September and January changes. Clements, the chief human resources official locally, invited representatives of all the Unions to a meeting in his office at the Baytown Refinery on August 12. Other human resources officials of the various Respondents also attended. There, Clements distributed a glossy, multipage Thrift Fund brochure outlining the intended changes, and used slide displays and other visual aids as part of his further explanations of them.¹⁸ GCIWU’s representative, Kenneth Evans, echoed by representatives of the other Unions, objected that “these sorts of things were what caused problems between . . . our union and the local management team.” (Elaborating from the witness stand, Evans stated, “Specifically, what I was referring to were announcements of unilateral changes without working through the unions.”) Evans also told Clements that “we considered these to be negotiable items and we would take whatever steps were necessary and we did not consider that particular meeting to be negotiations, but rather, information-gathering only.”

Six weeks later, on September 17, after the two September 1 changes had already been implemented without any of the Unions’ having asked to bargain about them, GCIWU’s Evans in some way sought further information from someone

whom he identified only as the “Thrift Plan trustee.” He received the requested information on September 30.

Twelve weeks after the August 12 meeting, on October 27, a representative of each Union sent a materially identical letter to a human resources official for each Respondent, a total of nine such letters. Each letter said pertinently,

Company representatives recently met with Union officials to announce proposed changes to the Exxon Thrift Plan. The [name of Union] hereby requests that negotiations be opened at your earliest convenience regarding these changes in employee benefits.

Please contact me . . . with information as to the time and place for the requested negotiation sessions.

V. NOVEMBER 17 MEETING OF ALL PARTIES; QUESTIONS OF CREDIBILITY AND CONTEXT

On November 17, Clements convened another meeting in his office with a group of representatives from each of the Unions, also attended by other human resources representatives of the Respondents, including ECA’s Payne. The union representatives were in each case also employees in one of the Houston area bargaining units. Clements was the admitted spokesperson for the Respondents.

The complaint alleges that in this meeting Clements violated Section 8(a)(1) by telling the “employees” there (i.e., the Unions’ representatives) that the Unions’ efforts to bargain about changes to the Thrift Plan would “damage the bargaining relationship,” and would in any case involve starting from a “blank sheet of paper.” Clements eventually denied making anything resembling the latter statement, but he did admit this much: First, referring to his purpose in calling the meeting, he said he “recognize[d], at least from my personal point of view, that there was an opportunity for this [the Unions’ demands for bargaining] to have a strain on the relationship.” As to what he said at the meeting itself, Clements also generally admitted (emphasis added):

In essence, what I tried to do was to share with them that we did not feel like *their request for bargaining* was timely, and that where that was *going to likely lead was a confrontation*, and that *my request to them was to withdraw their request for bargaining* in that us debating that point was *going to create a confrontation*, and that *in the interest of good labor relations, I didn’t feel like this was a good course for us to take*. I went on to say that if, in fact, at some future date, when the contract—when—at some future date, when we would bargain changes, recognizing that it was a mandatory subject of bargaining, that *we would not piece-meal bargain the elements of the Exxon thrift plan*, but that what we would do is respond to any proposed plan that they might offer as an alternative if the Unions were to pursue their demands to bargain.

In any case, three union representatives testified harmoniously and convincingly that Clements *also* threatened that any future bargaining on the issue would start with a “blank sheet of paper.” And a fifth witness, ECA’s Payne, clearly admitted to a version that largely supports the union representatives on this latter point, and plainly contradicts Clements’ denials. Crediting the Unions’ representatives as

¹⁷ It appears that some of the publicity materials came from Rouse’s human resources office in Houston, and others came from the Irving, Texas offices of the manager of the “Benefits Division” of the “Human Resources Department” of Exxon, itself.

¹⁸ The professionally printed, 13-page brochure was captioned “Exxon Thrift Plan[,] Plan Changes,” and bore on its cover page the familiar “Exxon” logo, clearly indicating that it was a product of Exxon headquarters decision making.

the most believable witnesses from the standpoints of both demeanor and probabilities, I will find that the complaint's characterization of Clements' remarks is substantially accurate. But because context may be important in judging the 8(a)(1) violation issue, and because each witness contributed somewhat different elements that are themselves valuable to an overall understanding of the context, I will set forth next in greater detail the versions of each witness, starting with the Unions' agents, passing through Payne's admissions, and ultimately revisiting other features within Clements' testimonial attempts to describe the meeting.

GCIWU's representative, Ken *Evans*, testified as follows on direct examination by the General Counsel:

Dave [Clements] began by saying he spoke in behalf of all the companies; by that, he meant the refinery, the Baytown chemical plant, Exxon Research and Engineering and the Houston chemical plant. He informed us that the corporation was in receipt of our letters of protest. We had initiated and organized a nation-wide protest . . . a letter-writing campaign regarding the changes. He said that the company was in receipt, and they were aware of our displeasure with the changes. He stated that the company recognized that the plan changes were an item of mandatory bargaining. He said that the purpose of the meeting was to ask that the unions drop the request to bargain since he did not see that any good could come out of it; that it could only damage the relationships between the unions and the company. And he said that if . . . they were forced to bargain over the changes, then we would start with a blank sheet of paper.

Q. Was there any response to these comments by any of the representatives of the union?

A. As I recall, at that meeting, [IAM agent] Tim Urban and I both told him that we would have to get back with him with a response to his request to drop the demand to bargain.

On cross-examination, Evans did not materially change his testimony, but he recalled, in addition, that Clements *also* said, "at the end of the meeting, I believe . . . that the company would argue that the request was not timely."

Similarly, IAM's Tim *Urban* testified materially,

Dave [Clements] started out with asking us to drop the issue of bargaining. He went on to say that if we continued, we were going to jeopardize the good relationship that we had. He said several times that they realized that this was a mandatory issue of bargaining, but that they wouldn't allow us to bargain on it because our request to bargain had not been made in a timely fashion. That is all I can remember Dave saying . . . let me back up. I forgot. Excuse me. Dave also went on to say that . . . if we continued with this matter, that they would have to start with a blank piece of paper. At that point, Kenny [Evans] made a statement that we had not asked to bargain the entire plan; that we simply had asked to negotiate the changes to the plan. I made a statement countering Dave's statement that we were jeopardizing our good relationship by saying that I thought we were doing was just business, and that we could continue our relationship . . . that we could pur-

sue this matter and could continue our relationship on other projects. Dave made the statement that even though it was mandatory to bargain, that we had not made a timely request, and that they were not going to allow us to bargain on the issue. He also made a statement later on . . . he offered a resolution, I guess you would call it. He made a resolution that they would . . . set up an on-site committee to hear employees' concerns and complaints about the changes. At that point, all four union presidents said no, we didn't believe that that was good enough and that that was going to settle the issue. We did tell him that we would take the matter back to the labor alliance, which is an alliance of the four unions in Baytown, to see if . . . it was acceptable.

Similarly, IBEW's representative, Ed *Maris*, recalled:

Basically, he [Clements] said that it would be in our best interest if we dropped the bargaining demands, that . . . they were untimely, that they would do us more harm than good. He and his superiors felt like it would hurt us in future negotiations. He did state that it was a bargainable issue, but if we were wanting to bargain it, we would start with a blank sheet of paper.

ECA's *Payne* had given a pretrial affidavit to the Board concerning the November 17 meeting, in which he quoted Clements as saying to the Unions' agents, *inter alia*,

If, in fact, it was bargainable, we would be starting with a clean piece of paper, and that it would be the present plan, versus the one the unions came up with.

During adverse examination by the General Counsel, however, Payne sought unconvincingly to disavow his affidavit as merely containing his "paraphrasing" of Clements' remarks. Thus:

Q. Clements said, and you agreed, that there was one thrift plan, and if, in fact, it was bargainable, they would be starting with a clean piece of paper; that it would be the present plan, versus the ones the unions came up with. Is that correct?

A. Well, that was my paraphrase of the statement of the situation. My—it was my paraphrasing in using the word—reference to the clean sheet of paper.

Q. I am sorry. You were paraphrasing—

A. It was my paraphrasing of that situation, as we were discussing that—the clean sheet of paper: my paraphrasing of the discussion.

Q. That was your paraphrasing in your affidavit, wasn't it?

A. Yes, it was.

Q. Okay. And I swore you to tell the truth before you gave that testimony, did I not?

A. That is exactly right.

Q. And you told the truth, as best you recalled it, at that time?

A. That is right.

Q. Is it—

JUDGE NELSON: Let me just see if I understand what you are saying, though. Clean sheet of paper were words you used to describe—

THE WITNESS: The discussions that—it was my paraphrasing that—of the discussion.

JUDGE NELSON: Mr. Clements didn't use that expression?

THE WITNESS: Well, it was my paraphrasing. I don't recall exactly what was said, but it—I did say that, in paraphrasing the situation of discussion, that a clean sheet of paper would be used.

.....

JUDGE NELSON: My question is did Mr. Clements use those words?

THE WITNESS: I really don't recall Mr. Clements using the words. But I sure said that in my affidavit, as my paraphrasing of the discussion.

JUDGE NELSON: Very well. Thank you.¹⁹

Clements was hard to pin down about what he actually said at the meeting, though given many chances to do so by the Respondents' attorney examining him. Thus:

A. I can try to paraphrase the key points that I made. First of all, I tried to set a tone of very low key, non-argumentative, to appeal from a logical base, recognizing that there were a lot of dynamics that had occurred as a result of these changes that the company had made. And there were several key messages that I wanted to share with them. One of the key messages was that it was obvious that the union leadership were quite upset with the plan changes, at least one of the plan changes, that was to be effective September 1. The most concerning area—and it was really two that they were concerned about—was a change that was effective September 1. And it had to do with how many times during the course of the month you could buy Exxon stock. In the past, you could pretty much trade, as if it were a brokerage house. And you could buy if the stock was low. And then the next day, if the stock

raised [sic], you could trade or sell it. In essence, the company restricted in it changes effective September 1, the number of times that an employee, that I, as an employee, or Ken Evans, as an employee, could buy or sell stock.

Q. Yes. Excuse me. Mr. Clements, if you could, just confine yourself to what it was you said at this meeting. Those—

A. Okay. And I am trying to just put a basis to that to say that there was a lot of energy around that issue. It was my sense, in having some informal conversations with the union and other employees, that there was concerns around that. We felt like that a motivator for the unions to request bargaining was to continue to put emphasis on and to display their concern about those changes.

JUDGE NELSON: Okay. I think Mr. Smith is still waiting for you to tell us about what you said in the meeting.

MR. SMITH: Yes.

THE WITNESS: Okay.

Q. (By Mr. Smith): Tell us what you said at the meeting.

A. Okay.

.....

A. Okay. Well—and I—okay. I will try to stay more focused in that regard.

But I think it is important to say that one of my messages to them was that, We hear you; We understand your displeasure with this one component of the changes, and that, I personally had the opportunity to share the concerns that you had shared with me—you, being the union leaders.

I have had the opportunity in advance of this meeting to share those concerns with some key players throughout the corporation: that was one of my messages.

I went on to say that I felt like the unions had been very successful in making their concerns about these changes—made the appropriate people aware of them, and that from that point on, it was not clear to me where their continued emphasis in this area was going.

I went on to say that I wasn't trying to sell the changes as far as being good or bad; they were what they were. We had the opportunity to kind of view the request for bargaining differently. They had formally requested bargaining.

In essence, what I tried to do was to share with them that we did not feel like their request for bargaining was timely, and that where that was going to likely lead was a confrontation, and that my request to them was to withdraw their request for bargaining in that us debating that point was going to create a confrontation, and that in the interest of good labor relations, I didn't feel like this was a good course for us to take.

I went on to say that if, in fact, at some future date, when the contract—when—at some future date, when we would bargain changes, recognizing that it was a mandatory subject of bargaining, that we would not piece-meal bargain the elements of the Exxon thrift plan, but that what we would do is respond to any proposed plan that they might offer as an alternative.

¹⁹ In addition, Payne conceded as follows from the witness stand:

Q. (By Ms. Gant): You gave your affidavit on or about January 7, 1993. Does that ring a bell?

A. That is correct.

Q. All right. And when I took this affidavit from you, I asked you to tell me, as best you recalled, what Mr. Clements' words were, did I not?

A. That is correct.

Q. Okay. And as best you recalled at that time, you told me what you remembered Mr. Clements saying, didn't you?

A. That was my best paraphrase—my best knowledge of what the discussion was.

.....

Q. Clements said that he wanted to discuss the issues. Is that correct?

A. That is correct.

Q. Clements said he wanted the unions to withdraw their requests for bargaining and that he wanted to find a way to meet everybody's interests. Is that correct?

A. That is correct.

Q. Clements said that if the unions pursued bargaining, the position of the company would be that the unions' requests to bargain were untimely. Is that correct?

A. That is correct.

Q. Clements said that if they pushed bargaining, it would be long, and strained. Is that correct?

A. That is correct.

And so all that to say is—that the major thrust of the conversation was to ask them to withdraw their request for bargaining as an alternative to pursue it, as we have subsequently done through this process.

Q. Did you suggest an alternative way by which the union or the employees might make their concerns known with regard to the thrift plan changes in the future?

A. Yes. In that regard, I said that we were very willing to continue discussing these changes, or other changes, as they may occur, and that there may be an opportunity to create a forum locally, in Baytown, where we would on a more pro-active basis be able to sit down once or twice a year and hear their concerns and have an opportunity to share those up-line.

And I don't recall if I called it a forum or a symposium; but a periodic gathering, where the four unions and the—another group of people could get together, and we could kind of provide on the front end some opportunity for dialogue on benefits in general.

Q. (By Mr. Smith): Mr. Clements, did you or did you not say that the company would start from a clean sheet of paper in the event that there was bargaining on the thrift plan?

A. I did not say that we would start from a clean sheet of paper.

Q. Or did you say the company would start from a blank sheet of paper in the event they bargained—

A. I didn't say anything about any piece of paper. What I did say was that we would react to any alternate benefit plan proposal that the unions would bring forward; that the actual Exxon plans covered people way beyond the acreage that Exxon owned in Baytown.

As we have heard testimony, it covers employees—all U. S. dollar-paid employees throughout the company and the corporation, and that making modifications to that plan would—recognizing that it went well beyond Baytown, was not something that we saw happening; that some other plan that might look similar could possibly be negotiated, recognizing that it was a murky crystal ball.

But nonetheless, I did not ever say that we would start from a blank or a clean sheet of paper.

To repeat, notwithstanding Payne's wafflings, and Clements' meanderings and ultimate denials, I find as fact that Clements told the Unions' agents that he wanted them to withdraw their requests to bargain, that their efforts to bargain would damage the bargaining relationship, and moreover, any such bargaining would necessarily have to start from "a blank [or 'clean'] sheet [or 'piece'] of paper."

VI. THE RESPONDENTS' DECEMBER 1 FINAL REPLIES TO UNIONS' DEMANDS TO BARGAIN; IMPLEMENTATION OF REMAINING CHANGES ON JANUARY 1, 1993

On November 18, the Unions' agents met together as the "Labor Alliance" and agreed that, despite Clements' statement on November 17, they would not drop their bargaining demands. On November 19, they met again with Clements and other human resources officials, in Clements' office, where they announced their intention to press their demands,

even while arguing again that this should not have to damage the overall union-management "relationship." They further asked for a written reply to their October 27 demands, and Clements agreed that one would be forthcoming.²⁰

On December 1 (November 30 in one case), representatives for each Respondent sent back identical replies to each Union, a total of seven such letters. Each letter said pertinently,

We are in receipt of your letter . . . requesting bargaining on the changes to the Thrift Plan. . . .

Even though the Company is very willing to discuss the Union's concerns with the changes, it is our position that the request for bargaining is untimely. While the Company is denying this request based on its untimely nature, the Company reserves all rights concerning any obligation to bargain.

Again, if you would like to discuss this response or the Unions concerns with the change[s], please let me know.

The parties stipulated that the Respondents commonly implemented the January changes, *supra*, on or about January 1, 1993, and that these changes were matters "over which the Unions had requested bargaining on October 27, 1992."

VII. PERTINENT PROVISIONS IN THE PARTIES' LABOR AGREEMENTS; FRAGMENTARY BARGAINING HISTORY RELATING TO THESE PROVISIONS

The 10 current labor agreements between the various Unions and the various Respondents are not identical in all their terms, but they all contain a "Benefits" or "Benefit Plans" section, and in each such section can be found nearly the same language. In the agreement between GCIWU and ERE, for example, article XXVII, B of the Benefit Plans section states in material part (emphasis added):

This Agreement shall not affect the eligibility of employees for participation in any company benefit plan (annuity plan, thrift plan, disability plans, contributory group life insurance plan, and noncontributory group life insurance plan), dependency pay for military leave and military-leave pay, or any other Company benefit plan now in effect, *all of which plans and programs shall be governed by their separate provisions. This provision, however, is not a waiver of such right as the Union has to bargain concerning these plans.*²¹

²⁰ I rely chiefly on GCIWU's Evans, and on harmonious supplemental recollections furnished by the other union witnesses, *supra*.

²¹ The benefits sections in the other agreements contain exactly the same, final ("non-waiver") sentence emphasized above, with one exception—the GCIWU-ECC agreement. And in the latter agreement, the "non-waiver" sentence is composed only slightly differently. Moreover, that agreement is also exceptional in that it does not contain the penultimate ("governed by their separate provisions") clause emphasized above. Thus, the contract between GCIWU and ECC states materially, at art. XVII, C:

nothing in this Agreement shall apply to or affect the Exxon Benefit Plan or any other of the Company's benefit plans or programs. This provision, however, is not a waiver of such rights as the Union has to bargain concerning such plans or programs.

EUSA's Clements testified that he did research in the company's labor relations archives for various purposes associated with this case, unearthing records of bargaining events predating his own association with Exxon, including some preceding Exxon's corporate emergence from the former Standard Oil Company of New Jersey, at a time when Standard Oil of New Jersey's stateside operations were being conducted under the "Humble Oil" name. Based on that research, Clements testified that the above-emphasized language, or minor variations on it, have appeared in at least some of the parties' labor agreements since sometime in the 1950s.²² He stated, however, that the "first time such language appeared in any of the Respondents' labor agreements with GCIWU was in '1964.'" And apparently the only records he found bearing on the meaning of the "Article XXVII" language, *supra*, was in the form of management notes of certain bargaining meetings with GCIWU in 1964—on January 22 and 24 and March 3.²³ I received these notes as records of regularly conducted activity, and therefore as exceptions to the rule against hearsay.²⁴ This is what they say in material part (emphasis added):

[January 22, 1964 Meeting]

The Union asked for an explanation in the last sentence in item B. Management stated that the courts have decided that benefits are bargainable and that the purpose of the sentence is to make this clear. However, the purpose of the sentence about the Benefits Plans being governed by their separate provisions is to convey the thought that the plans are not subject to bargaining during the term of the contract. *The effect of the last two sentences is therefore to provide that any bargaining between the parties on the plans should be done when the contract is open.* The Union asked whether it could bargain on any changes made in the plans during the term of a contract. Management answered in the negative and explained that the Company has 45 union contracts and it would be unwieldy for the Company to have to bargain with each of these unions when changes have to be made in the plans. It emphasized that it would discuss changes with the Union before they are made, as it had in the past, but that the Union would not have the right to take the Company to arbitration if the parties fail to reach agreement concerning the changes. The Union asked whether with an open-end contract it could open the contract for amendment in the event the Company decided to change one of the plans, such as was done with the Employee Discount Plan in 1961. Management answered that the Union could open its contract, but the Company's position on bargaining concerning the plans was that if the Union insisted upon bargaining, as dis-

tinguished from discussing a plan, it would discontinue all the plans with respect to that group and bargain for new plans. Management voiced the opinion that the group would not fare as well because there are substantially more benefits available for the entire Humble personnel than for any segment of it. Management stressed that employee reaction to any change in the plans is communicated to Headquarters and has its effect upon future course of action.

The provisions of this Article remained unresolved.

[January 24, 1964 Meeting]

ARTICLE XXVII

HUMBLE BENEFIT PLAN

At the Union's request, Management explained . . . that the purpose of [proposed clause] B was to provide that while the Union could bargain on the plans when the contract is open, it cannot take the Company to arbitration for its failure to bargain on the Benefit Plan during the term of the contract. Management added that since 1919, Jersey has had controlling interest in Humble and the old Humble plans were patterned after Jersey's plans, and since the merger of 1961, many improvements had been made in the plans over those in effect with the old Humble Company. Management stressed the advantages of centralized plans and pointed out that nonrepresented employees had no bargaining rights at any time on the plans. Management asserted that the Company is always interested in how the employees feel about the plans and has changed them many times because of employee attitudes. The Union asked whether the Article as it is would preclude the Union's presenting a complaint on the plans. Management answered that the Union should always feel free to present a complaint and that if an error had been made, the Company wanted it called to the attention of the proper persons promptly. Management stressed that the Union apparently discounted its influence on the Company concerning the plans. The Union said that apparently it did no good for the various unions to complain about the reduction in the employee discount on gasoline and tires. Management explained that the various complaints from all over the Company were transmitted to Headquarters and they were given very serious consideration.

The next meeting will be held . . . January 30. The meeting was adjourned.

[March 3, 1964 Meeting²⁵]

ARTICLE XXVII

HUMBLE BENEFIT PLAN

Management explained that in XXVII B it had provided that for the duration of the contract the Union had waived the right to bargain on the provisions of an

²² Thus, referring to the art. XXVII, B language, Clements said, "[T]his is something that has been traditional with our company for years, all the way back to the '50s when the language was first bargained with some of the other unions that are part of this litigation."

²³ The record does not indicate which of the GCIWU units was the subject of the negotiations the notes purport to summarize, nor which "company" (or "companies") within the "Humble" family was (were) the nominal "employer(s)" of the employees for whom the GCIWU was then negotiating.

²⁴ Fed.R.Evid. 803 (6).

²⁵ It would appear from the last sentence in the notes of the January 24 meeting, *supra*, that there had been at least one more bargaining meeting between January 24 and March 3.

existing plan, and that the Trustees have the right to change the provisions of the plan for the three-year period of the contract, but as a practical matter it would talk to the Union about any significant changes in a plan. Also, the last sentence of the Article provided that the Union had not waived its right to bargain on benefits, and thus the Union had the right to bargain on new benefits or on existing benefits when the contract is open. The Union mentioned that benefits are a mandatory subject of bargaining under the law, just as wages are, with which Management agreed.

VIII. HISTORICAL PRACTICE; THE UNIONS' ACQUIESCENCE IN PREVIOUS BENEFIT PLAN "CHANGES"

Rouse testified, supported by a summarizing document captioned "Benefit Plan Changes,"²⁶ that during the decades of the existence of the Benefit Plan, at least 128 "changes" have been made to one or more of the individual plans subsumed within the overall Benefit Plan. (As I elaborate below, of the 128 "Benefit Plan Changes" summarized in R. Exh. 4, only about 49 of the change items involved changes associated with the Thrift Plan. And this latter total includes two changes which traced from "amendments" to the Trust Declaration, not from "administrative changes" by the trustees, as well as the seven changes first announced to the Unions on August 1.) Rouse further testified that the company normally preadvised the Unions (and all unions within the Exxon family of companies) about these intended changes, but that the Unions had never previously sought to bargain about them.

Rouse's testimony just cited is uncontradicted, and I therefore credit him. But insofar as the Unions' historical acquiescence is now invoked by the Respondents as tending to support a union-waiver defense, there is more to be said on the subject: Thus, GCIWU's Evans testified that GCIWU had not sought to bargain about the changes occurring before the ones now in question because they were seen by GCIWU as being favorable to the interests of the employees represented by that Union. I find this to be a plausible counter-explanation for the Unions' historical acquiescence, one that does not necessarily betoken a "waiver" of all future interest in any or all future changes to the Thrift Plan. I reach this finding particularly in the light of my further findings below about the kind of changes to the Thrift Plan the Unions had been historically presented with prior to the ones now in question.

IX. THE NATURE OF PREVIOUS THRIFT PLAN CHANGES²⁷

Of the 49 Thrift Plan changes itemized in the Respondents' summary exhibit, 2 were the products of "amend-

ments" to the Thrift Trust Declaration.²⁸ The remaining 47 change items were what the Respondents' counsel call "administrative changes," authorized by the trustees. Of these 47 "administrative" changes, 37 (i.e., 79 percent of them) involved loan interest rate changes. (Some of these involved interest rate decreases, others involved increases; all such changes apparently tracked the market, but on a discounted level.²⁹) Another four changes had to do with "Optional Insurance" on Thrift Fund loans. (The first announced the loan insurance option; the other three announced successive reductions in the optional loan insurance premium rate.) Another five related to the DDA plan (the first announced the DDA option; the remaining four enhanced or expanded it in its particulars).³⁰ Other historical changes were each unique in character, and I list them separately below, noting first the effective date of each change:

- (5/31/78) Option to participants nearing retirement of "rolling over" Thrift Fund distributions into "IRA's, IRAN's and IRB's."
- (1/1/81) "More frequent determination of common asset earnings and more frequent crediting of those earnings to accounts."

letins into evidence as a package exhibit, which I have marked as "General Counsel's Exhibit 6." Moreover, I have reviewed certain of the underlying bulletins to gain a fuller understanding of some of the changes summarized in R. Exh. 4, and my findings in this section concerning those changes are in part informed by details from the underlying bulletins.

²⁸ One (summarized in R. Exh. 4, p. 2, item 15) traced from a 1976 amendment permitting retirees to defer distribution of their Thrift Fund account shares. The other (summarized, id. at p. 4, item 55), traced from a 1985 amendment (see in this latter regard, G.C. Exh. 6, bulletin 737) permitting employees anticipating termination or retirement to withdraw their tax-paid credit balance prior to the termination or retirement, even if (contrary to more general restrictions) they had already made a withdrawal during the preceding 6 months.

²⁹ Rouse substantially confirmed this analysis of the Thrift Plan change items reflected in the summary exhibit, saying "Probably the most common might be changes in interest rates, because you have to be able to react quickly to what the market is doing." In addition, and bearing on GCIWU Agent Evans' testimony that his union's historical acquiescence in Thrift Plan changes was based on a judgment that the changes were beneficial to GCIWU's membership, the Respondents' counsel had this exchange with Evans on cross-examination:

Q. Okay. And an increase in the interest rate on those loans would be a negative impact on potential borrowers. Isn't that true?

A. Not necessarily; if it still beats the current rate, I would say it is still a good deal.

³⁰ This is the chronology of the effective dates of the DDA-related changes and what they were:

(8/1/88) Creation of Direct Dividend Account (DDA) option in Thrift Plan.

(1/1/89) Additional DDA Options (Characterized as "Enhancements" in R. Exh. 4).

(10/17/90) "Participants who consent to final distribution of their Thrift Fund Account may elect to sell all shares (100%) of Exxon stock held in their DDA Account."

(2/1/91) DDA diversification for employees over age 55 with 10 years of participation.

(2/1/93) [targeted by the complaint] DDA Diversification in Cash.

²⁶ R. Exh. 4.

²⁷ Along with her brief, counsel for the General Counsel submitted a packet of Exxon administrative bulletins which were the subjects of the summaries in R. Exh. 4. At fn. 6 of her brief, counsel for the General Counsel moves for the receipt of these underlying bulletins into evidence, because she has "conclude[d] that . . . Respondents' Exhibit 4 does not adequately describe certain bulletins." She represents that "Respondent [sic] has no objection to the receipt of these documents." The General Counsel's motion (although unwisely buried within a brief) is consistent with allowances I made at the trial for such a submission, and the Respondents have not subsequently objected to this submission. I therefore receive these bul-

- (4/6/87) New procedures to be followed (seemingly less drastic ones, from the employee's standpoint) when a Thrift Fund borrower cancels his/her authorization for payroll deduction and subsequently fails to make loan repayments on schedule.³¹

³¹As set forth more fully in G.C. Exh. 6, bulletin 922, the old practice in cases where borrowers had canceled payroll deduction authorizations and had then ceased to make scheduled loan repayments was for the company accounting office to "declare the loan in default immediately and set off the amount due from the participant's Thrift Account balance[,] . . . typically involv[ing] a taxable distribution from the account[.]" The new practice announced in the bulletin was to impose a "nonpayment penalty charge," but gave

- (6/15/87) Continuation of "temporary restrictions on certain account transactions," all "prompted by changes in the tax laws," and "delay[s] in the release of clarifying information from the government and necessary revisions to forms and systems."³²

- (9/1/90) Independent Loans (borrow more; no longer can "recast"; can obtain 4 "individual loans" for 48 months.

the accounting office discretion, "at its option," to declare a default "at some future date."

³²See R. Exh. 4, p. 6, item 77; G.C. Exh. 6, bulletin 933, pp. 1-2.